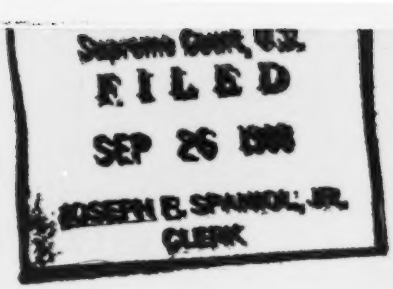
88-549



No. 88-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JAMES W. LEE,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents,

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Steven P. Oliver
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Is a citizen's occupancy of land as a primary place of residence the sole condition for reconveyance of land under Alaska Native Claims Settlement Act §14(c)(1), from land patented to a Native Village corporation under §14(a) of that Act?

PARTIES INVOLVED

In addition to the parties named in the caption, the Court of Appeals' Amended Opinion names Cook Inlet Region, Inc. in its caption. Cook Inlet did not participate in the proceedings before the Court of Appeals.

TABLE OF CONTENTS

Question Presented for Review	i
Parties Involved	i
Table of Authorities	iii
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Statutes	2
Statement	3
Reasons for Granting the Writ	11
Conclusion	27

TABLE OF AUTHORITIES

Cases:	Page
Block v. North Dakota, 461 U.S. 273 (1983)	21
Hakala v. Atxam, 753 P.2d 1144 (Alaska 1988)	21
INS v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987)	17, 20
Knapp v. Alexander-Edgar Co., 237 U.S. 162 (1915)	23
Lee v. United States, 809 F.2d 1406 (9th Cir. 1987), cert. denied, 56 U.S.L.W. 3498 (1988)	6
Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 108 S.Ct. 1350 (1988)	16
Rector v. Gibbon, 111 U.S. 277 (1883)	23
Rodriguez v. United States, 107 S.Ct. 1391 (1987)	17
Shepley v. Cowan, 91 U.S. 330 (1875)	22,23
United States v. Atlantic Richfield, 612 F.2d 1132 (9th Cir. 1980), cert. denied, 449 U.S. 888 (1980)	17, 25
United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir 1971)	13

Statutes:

Federal Power Act §24;
16 U.S.C. §818 5, 7, 8, 13, 19, 20, 22

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 3

28 U.S.C. §2409a(g) 6, 24

Alaska Native Claims Settlement Act
§3(e); 43 U.S.C.
§1602(e) 2, 8, 9, 11, 14, 15

Alaska Native Claims Settlement Act
§11(a); 43 U.S.C. §1610(a) 9, 11, 14

Alaska Native Claims Settlement Act
§14(a); 43 U.S.C.
§1613(a) 3, 9, 11, 14

Alaska Native Claims Settlement Act
§14(c)(1)-(5); 43 U.S.C.
§1613(c)(1)-(5) passim

Alaska Native Claims Settlement Act
§14(g); 43 U.S.C. §1613(g) 10, 20

Alaska Native Claims Settlement Act
§22(b); 43 U.S.C. 10, 14, 20
§1621(b)

Alaska Native Claims Settlement Act
§26, 85 Stat. 715 2, 13
(Pub. Law 92-203)

43 U.S.C. §1632(a), (b) 4, 11, 24, 25

Other Authority:

Statement of Joseph Fitzgerald,
Hearing on S. 1830, Senate
Committee on Interior Affairs,
91st Cong., 1st Sess. 121,
126 (1969) 19, 25, 27

PETITION FOR WRIT OF CERTIORARI

James W. Lee respectfully petitions this Court to issue a writ of certiorari to review the judgment and amended opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

OPINIONS BELOW

The United States Court of Appeals issued an Amended Opinion on June 27, 1988. The opinion is reported at 841 F.2d 968, with an omission, and appears as Appendix A to the petition of Therese U. Donnelly from the same decision, filed in this Court on or about September 23, 1988. The district court's Opinion appears as Appendix C to the Donnelly petition, p. 32a. Lee respectfully refers the Court to the Donnelly Appendix.

JURISDICTION

This is a petition for review

of a final judgment of the United States Court of Appeals for the Ninth Circuit entered on June 27, 1988. An order denying a petition for rehearing was entered on June 27, 1988. The judgment and order appear as Appendices I, p. 94a, and J, p. 96a, to the Donnelly petition. Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

STATUTES

This petition involves Federal Power Act, §24, 16 U.S.C. §818; Alaska Native Claims Settlement Act ("ANCSA") §§3(e), 14(c)(1) and 26, and 43 U.S.C. §1632. ANCSA §§3(e) and 14(c)(1), as amended, now appear as 43 U.S.C. §§1602(e) and 1613(c)(1). §26 appears at 85 Stat. 715 (Public Law 92-203, Dec. 18, 1971). As enacted in 1971, ANCSA §14(c)(1) provided

> Each patent issued pursuant to subsections (a) and (b) shall be

> subject to the requirements of this subsection. Upon receipt of a patent or patents: (1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

The remaining statutes are set out in Appendix P to the Donnelly petition, to which Lee respectfully refers the Court.

STATEMENT

James W. Lee occupied as his residence a tract of land in Alaska which in 1979 was patented to Eklutna, Inc. under ANCSA §14(a). Eklutna is a Village corporation organized under ANCSA. In the district court Lee prayed for a surface conveyance from Eklutna under ANCSA §14(c)(1). The district court had jurisdiction under 28 U.S.C. §1331 since a federal question was involved. Congress intended judicial

review of a Village corporation's refusal of a §14(c) surface conveyance. 43 U.S.C. §1632(b).

Lee contends that §14(c)(1) rights do not depend on any other title or right of occupancy which Lee may have but, since the lower courts placed these matters in issue, Lee briefly reviews this background: In 1957 James W. Lee entered a 160 acre contiguous tract in the Eagle River Valley in Alaska hoping to obtain a homestead patent. The BLM afterwards told Lee that only part of his land was available for the homestead laws because part of it, the BLM said, was within a power site classification. Lee, via his wife Charlice, wrote to the Bureau of Land Management Director, the Federal Power Commission and, finally, the Secretary of the Interior about the alleged power withdrawal. Donnelly

App. N, p. 111a. The Secretary represented to the Lees that federal law forbade homesteading on the land. Donnelly App. O, p. 113a, despite the command of §24 of the Federal Power Act ("§24FPA")(Donnelly App. P, p. 115a) that the land be opened to homestead entry immediately following the Federal Power Commission's 1952 determination that the land be opened to homesteading. Donnelly App. M, p. 107a.

Lee eventually obtained patent, in the 1960s, to the part of the land which was not within the area the BLM said was withdrawn to protect future electrical power reservoirs.

The allegedly withdrawn land was lower in elevation than the remainder. However, the BLM did not adopt an official survey delineating the boundary of the alleged reserve until the mid-1960s.

At all times since 1958 Lee has lived on the unitary 160 acre tract, except for a period in the early 1960s when he was stationed in Korea on military duty. In late 1971 the BLM served on Lee a notice claiming that he was in violation of the Unlawful Inclosures Act and demanded that he move his improvements. He did move some of his improvements.

Lee's homestead law claim was part of an earlier appeal, Lee v. United States, 809 F.2d 1406 (9th Cir. 1987), cert. denied, 56 U.S.L.W. 3498 (1988). That earlier appeal did not, however, consider Lee's rights (1) to equitable relief other than under the Quiet Title Act of 1972, 28 U.S.C. §2409a ("QTA") or (2) Lee's right to a surface conveyance under ANCSA §14(c)(1). Lee's §14(c)(1) claim was the subject of a Rule 54(b) determination in the dis-

trict court which came on for a later appeal before the Ninth Circuit. The latter appeal was consolidated with the case of Donnelly v. United States. The Ninth Circuit's Amended Opinion, June 27, 1988, affirmed the district court's dismissal of their claims for §14(c)(1) reconveyances.

The Ninth Circuit stated that Lee's §14(c) claim had to be "based on" his homestead title claim against the United States under the QTA. Donnelly App. A, p. 16a. The Ninth Circuit also felt that allowing a §14(c) conveyance would violate §24FPA, a statute which on its face protects only "lands of the United States" -- and then only to the extent necessary to restrict disposition which might interefere with possible dams which might be licensed under the Federal Power Act. Donnelly App. A, p. 15a. §24 FPA did

not forbid occupancy; it merely reserved to the United States a right of re-entry. See §24FPA, Donnelly App. P, p. 115a.

Moreover, once the land was conveyed to Native corporations under ANCSA it was no longer "lands of the United States" and §24FPA by its terms ceased to operate. ANCSA §14(c)(1), however, operates on land after it has been conveyed to a Village corporation ("Upon receipt of a patent . . . the Village Corporation shall first convey . . .".).

When in 1971 Congress passed the Alaska Native Claims Settlement Act ("ANCSA"), it defined "public lands" as any federally-owned lands. ANCSA §3(e). Since this definition covers all Alaska lands not in private ownership, it is immaterial whether the land was previously in any federal land withdrawal. ANCSA granted lands

to Native corporations via §11(a) and §14(a) of ANCSA, which provide that land was to be selected under ANCSA from "public lands".

It is noted that ANCSA §3(e), §11(a) specify limited, named exclusions from federal lands which will not be "public lands" under ANCSA, such as National Park land and defense reserves, as either not being public land or not available for Native selection and conveyance.

Congress provided, however, that of the public lands that were available for Native conveyance and which were in fact so conveyed, the ANCSA patentees were obliged to take certain actions land was patented to them under ANCSA §14(a). Native corporations were required to ascertain the persons in physical occupancy of any of such lands. If such persons' occupancy was either

for residence or business purposes, ANCSA §14(c)(1) enjoins Native corporations to convey the surface estates of such lands to such occupants. ANCSA §14(c)(2)-(4) provided for similar conveyances to other entities for other specified purposes. Donnelly App. P, p. 123a-124a. Nowhere in §14(c) does any language suggest a requirement that the occupant possess any right of occupancy of the land, as against the United States, the Native village, or anyone else.

No other statute (or regulation for that matter) imposed any additional conditions on §14(c)(1) conveyances.

In contrast, ANCSA §§14(g) and 22 (Donnelly App. P., pp. 125a, 130a) provide for issuance of patents to persons who have independent claims to title under the federal public lands and mining statutes.

In 1980 Congress added 43 U.S.C. §1632(b) providing limitations period for review of Native corporations' decisions to convey or not convey such lands to surface occupants.

REASONS FOR GRANTING THE WRIT

Congress's Plain Language Fully Expresses Its Legislative Judgment That Occupants Must Be Issued Surface Conveyances of Alaska Land.

Eklutna, Inc., defendant in the district court, received a patent pursuant to ANCSA §14(a) in 1979. As directed by §14(a), the lands patented to Eklutna were the lands withdrawn under ANCSA §11(a) from "public lands". "Public lands" is specially defined in ANCSA §3(e):

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska

> Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

This definition superseded all prior land withdrawals or classifications, so far as ANCSA was concerned. With exceptions specified in ANCSA, this definition causes all Native land selections under ANCSA to be made from any federally-owned lands in Alaska, without regard to their status, as withdrawn or not-withdrawn, reserved or not-reserved, or otherwise subject to any restriction or classification.

Were ANCSA otherwise drafted, the subject lands in this case could not have been conveyed to Eklutna, Inc., if they were in a valid land withdrawal. But they were so conveyed; the immediate consequence of this fact is that the withdrawal, if any, of these lands was permanently terminated once Eklutna selected these lands.

By virtue of the Native selection, they then ceased being "lands of the United States" and §24FPA by its terms was no longer in force. Nothing in United States v. Consolidated Mines and Smelting Co., 455 F.2d 432 (9th Cir. 1971) is to the contrary.

Congress did not and was not required to state in so many words that any prior alleged withdrawals were superseded. §26 of the Act (uncodified) provides:

> To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.

85 Stat. 715 (Pub. Law 92-203). Emphasis supplied.

Once such alleged prior withdrawals were superseded with respect to one provision of the Act, they were superseded as to all provisions. This is the obvious intent of a unitary enactment

containing a uniform definitions section (ANCSA §3(e): "For the purposes of this Act, the term . . . "Public lands" means . . .".). ANCSA simply does not direct that lands are "public lands" for one purpose (§11(a), §14(a)) under ANCSA but not for other purposes (§14(c)).

As noted above, ANCSA §3(e) made certain specific exclusions from "public lands". §11(a) (Donnelly App. P., p. 121a) specified also that lands in National Park System and lands withdrawn "for national defense purposes other than Naval Petroleum Reserve Numbered 4" should be excluded from the lands available to Natives. §22(b) provides that entries made in violation of one specified withdrawal (Public Land Order 4582) would not receive patents. §22(1) specified that certain municipal lands could not be selected.

ANCSA in blunt terms requires Native corporations to reconvey the surface estate to persons using the land for certain specified purposes.

The gist of this petition deals with the Court of Appeals' novel declaration, unfounded in statute, that notwithstanding §3(e) of ANCSA, the courts should transpose the limitations of the homestead laws to §14(c)(1) reconveyances.

The immediate and insuperable obstacle to this is the principle that the literal words of Congress are to prevail unless (1) there is a demonstrable ambiguity, or (2) there is a demonstrable conflict with the express purpose of the statute. Neither exists here. Congress's directions are clear and therefore conclusive. The decisions below are judicial relegislation in the guise of interpretation. The lower

courts had no authority to disregard §14(c)'s language.

This Court frequently has declared that federal courts lack power to rewrite statutes. Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 108 S.Ct. 1350, 1354 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws.") This principle is particularly appropriate where Congress never voiced any belief in the Court of Appeals' view that §14(c) is subject to additional conditions. As stated in another case,

> But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history . . . '[there is no occasion] to examine the

> additional considerations of 'policy' . . .that may have influenced the lawmakers in their formulation of the statute.'" Aaron v. SEC, 446 U.S. 680, 695, 100 S.Ct. 1945, 1954, 64 L.Ed.2d 611 (1980) quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 n. 33, 96 S.Ct. 1375, 1391 n. 33, 47 L.Ed.2d 668 (1976).

Rodriguez v. United States, 107 S.Ct. 1391, 1393 (1987).

Congress specified elsewhere in the Act when, and under what conditions, pre-existing land withdrawals were to limit land transfers directed under the Act. See pp. 9, 14 above. The omission of a similar condition in §14(c) signifies that this omission was deliberate. INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1213 (1987). ANCSA was a thoroughly considered Act, done in consultation with Alaska Natives represented by counsel. United States v. Atlantic Richfield, 612 F.2d 1132, 1139 (9th Cir. 1980) cert. denied 449 U.S. 888 (1980).

Under the Court of Appeals' theory, if a village were entirely within a land withdrawal, no one, Native or non-Native would be entitled to a §14(c) conveyance. However, a village 50 miles away which was not in a withdrawal, would be required to execute conveyances to all occupants. However, no purpose of ANCSA is served by depriving occupants of title if the land was in a withdrawal except for those withdrawals which Congress expressly preserved in ANCSA. Congress appears to have been indifferent to such withdrawals except in those instances where it so specified.

The only practical argument given by the Court of Appeals is that §14(c)(1), if enforced, reduces the land retained by Native village corporations. ANCSA §14(c) conveyances do not detract from the ANCSA settlement but are <u>part of</u> ANCSA's express purpose

to protect occupants, Native and non-Native, on an equal basis. See ANCSA §14(c)(1); Statement of Joseph Fitzgerald, Hearing on S. 1830, Senate Committee on Interior Affairs, 91st Cong., 1st Sess. 121, 126 (1969). The Court of Appeals' conclusion that §14(c) conveyances detract from the purpose of ANCSA is pure speculation and is opposed to the literal terms of the statute.

Moreover, Congress is presumed to have believed that its own previous laws had been complied with, so it never expected this particular power withdrawal to have any effect. Under §24 FPA this land was, or ought to have been, fully open to homestead occupancy since 1952; certainly it was or ought to have been open to Lee's homestead entry which he initiated in 1957. There is no way of reading

§24FPA to obtain a different result.

Just as prior land withdrawals are irrelevant to §14(c) reconveyances, Congress did not require that a person be able to quiet his or her title to §14(c) land, as against the United States, to obtain an occupancy conveyance under that section. Congress specified elsewhere in the Act where pre-existing land rights of individuals constituted a requirement or a limitation on conveyances. §§14(g), 22(b). The omission of similar requirements from §14(c) was deliberate. INS v. Cardoza-Fonseca, supra. Obviously, if a person already had such title there would be no need for §14(c). The land would already be in the hands of one entitled to it (by reason of §§14(g) or 22(b) or prior federal law) and would never be conveyed to Native corporations in the first instance.

Congress never intended that the test for §14(c)(1) to be to quiet title against the United States. QTA is subject to severe jurisdictional limitations to protect certain governmental interests. Block v. North Dakota, 461 U.S. 273, 285 (1983). By enacting §14(c)(1) Congress intended a new, independent grant to arise as of the date of conveyance, on land in which the United States had no interest. Hence the protections of the federal purse were irrelevant. It is pure speculation that Congress intended to disqualify anyone because of the previous status of land, or any previous acts of the occupant.

The Supreme Court of Alaska adopted a common sense reading of ANCSA §14(c)(1) in Hakala v. Atxam, 753 P.2d 1144 (Alaska 1988). It found no conditions relating to preexisting titles or withdrawals.

There was no reason for the Ninth Circuit Court of Appeals to read such conditions into the statute.

The Court of Appeals said the illegality of the withdrawal "calls for speculation". Amended Opinion, Donnelly App. A, p. 16a. §24FPA does not call for speculation. §24 required the Secretary to open land to homesteaders immediately after the FPC determined that homestead entry would not injure the electric power value of the land. Lee was the first (and, incidentally, only homestead entryman on the land) in time and therefore first in right. Shepley v. Cowan, 91 U.S. 330, 337 (1875). If the BLM contended that other persons rights might be involved, it would have not have claimed that the law did not permit homesteading, Donnelly App. O, p. 113a. The proper procedure would have been to adjudicate

the competing rights of others. 5 U.S.C. §558, Shepley, supra.

This Court has never permitted a government agency to fail to properly process an application and then rely on its own failure to do so as a ground for denying relief. Rector v. Gibbon, 111 U.S. 277, 291 (1883), Knapp v. Alexander-Edgar Co., 237 U.S. 162, 167-169 (1915). Since the alleged withdrawal was clearly illegal in the first instance, the burden lay on those who oppose Lee's homestead title and occupancy to show that the BLM could properly have denied Lee's homestead claim in the first instance. A homestead entry once lawfully initiated, cannot be prejudiced by the government maladministration of the public land laws or by subsequent government restrictions on the land. Knapp v. Alexander-Edgar Co., 237 U.S. 162, 166-167 (1915).

Under §14(c)(1), however, Congress never intended either Eklutna or the courts to become involved with such questions. That is why it wrote the statute simply and clearly in the first instance. The omission of complicated conditions facilitates the operation of §14(c)(1).

Nevertheless, it is clear that Congress intended Native corporations to make all necessary determinations under §14(c)(1) and that these decisions would be subject to judicial review as to all questions of law. 43 U.S.C. §1632(b).

Significantly, §1632(b) is the second part of a larger statute, of which §1632(a) is the first part. The two subsections contemplate different periods of limitations, and both periods are independent of the Quiet Title Act's statute of limitations, 28 U.S.C.

§2409a(g). It follows immediately from these facts that Congress believed that §14(c) had nothing to do either with the Quiet Title Act or the Secretary's land title decisions under ANCSA. 43 U.S.C. §1632 appears in Donnelly App. P, p. 132a.

No public policy is served by construing §14(c) restrictively. The Natives of Alaska participated in the drafting of ANCSA. They were guided by independent counsel. United States v. Atlantic Richfield, supra, at 612 F.2d 1139. They understood that ANCSA §14(c)(1) would reduce the amount of land retained by Village corporations, but nevertheless believed that §14(c)(1) should be part of the Act. Statement of Joseph Fitzgerald, supra. The reasons for the acceptance of this legislation are clear. The grant of 40,000,000 acres (62,500 square miles) is a vast

expanse of land. Selections were to be made by each of 205 independent villages organized as village corporations under ANCSA. 43 U.S.C. §1610(b), 1613(a), (h). Alaska natives realized, even as is now realized by all residents of Alaska who have travelled outside cities, that nearly all occupants of Alaska land outside the cities live in small clustered settlements in or nearby the numerous villages. It was thus obvious to those who promoted this legislation -- the Natives themselves -- that §14(c)(1) would reduce the acreages retained by village corporations. But it was also understood that transferring surface titles into the hands of occupants was <u>one of the very purposes of the Act</u>. §14(c) reconveyances possess a status as high as the patents to Village corporations in the first in-

stance. In so legislating, Congress determined that all residents, Native or non-Native should be treated equally. Statement of Joseph Fitzgerald, supra. Moreover, because of the limited scope of such settlement, compared to the vast tracts of unoccupied land patented to village corporations, transferring such lands would not, by any stretch of the imagination, undermine the Act's settlement or deprive Alaska Natives of the benefits intended by the Act.

Conclusion

For the foregoing reasons James W. Lee asks this Court to grant a writ of certiorari to review a major question of federal law affecting thousands of persons using land in Alaska. ANCSA §14(c) is one of the key provisions of Congress's program which, if not here reviewed, will be permanently

defeated. This is not only a question vitally important to Alaska's citizens. It presents a broader question of public lands law: whether courts possess a license to impose unlimited conditions on federal land disposal statutes to further nonlegislative policies.

Dated this 26th day of September, 1988.

Steven P. Oliver

STEVEN P. OLIVER
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Attorney for Petitioner
James W. Lee

(2)

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-549

In The
Supreme Court of the United States
October Term, 1988

JAMES W. LEE,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents,

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT EKLUTNA, INC.'S BRIEF IN OPPOSITION

DAVID P. WOLF
JAMES S. CRANE
Counsel for Respondent, Eklutna, Inc.
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

33 pp

QUESTIONS PRESENTED

1. Whether § 14(c)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1613(c)(1), should be construed against a trespasser on Federal land to deny him amnesty and the right to take the land away from an Alaska Native Village Corporation, the intended beneficiary of ANCSA and holder of the patent to the land?

2. Whether the United States is an indispensable party to a suit filed by a failed homesteader under ANCSA § 14(c)(1) against an Alaskan Native Village Corporation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	9
I. ANCSA WAS INTENDED TO BENEFIT ALASKA NATIVES, NOT TO BENEFIT TRESPASSERS	10
II. THE ALASKA SUPREME COURT HAS NOT HELD THAT § 14(c)(1) OFFERS AMNESTY TO TRESPASSERS	12
III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO LEE'S CLAIM TO A HOMESTEAD	15
IV. THE DECISION BELOW WAS JUSTLY DECIDED AND IS OF LIMITED IMPACT	22
CONCLUSION	23
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

CASES

Block v. North Dakota, 461 U.S. 273 (1983) 18

Buch v. Morton, 449 F.2d 600 (9th Cir. 1971) 7

Buettner v. Kavilco, Inc., — F.2d —, 1988 West Law 111344 (October 26, 1988) (9th Cir. 1988) 13, 14

California Fed. Sav. and Loan Ass'n. v. Guerra, 479 U.S. 272, 107 S.Ct. 683 (1987) 12

Cape Fox Corp. v. United States, 4 Cl.Ct. 223 (1983) 10

Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) 12

Donnelly v. United States, 841 F.2d 968 (9th Cir. 1988) 8, 9, 15, 18

Duluth & Iron Range RR. v. Roy, 173 U.S. 587 (1899) 18

Hakala v. Atxam Corporation, 753 P.2d 1144 (Alaska 1988) 8, 13, 14

Hoofnagle v. Anderson, 20 U.S. (7 Wheat) 212, 5 L.Ed. 437 (1822) 18

Kale v. United States, 489 F.2d 449 (9th Cir. 1973), *cert. denied* 417 U.S. 915 (1974) 18

Lee v. Eklutna, Inc., — U.S. —, 108 S.Ct. 772 (1988) 5

Lee v. United States, 629 F.Supp. 721 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee v. Eklutna, Inc.*, — U.S. —, 108 S.Ct. 772 (1988) 15, 17

Lee v. United States, 629 F.Supp. 721 (D.Alaska 1985) 4, 5, 9, 17

Lee v. United States, 809 F.2d 1406 (9th Cir. 1987) 5, 18

Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945) 20

TABLE OF AUTHORITIES—Continued

Page

Nichols v. Rysavy, 610 F.Supp. 1245 (D.C.S.D. 1985), *aff'd* 809 F.2d 1317 (8th Cir. 1987), *cert. denied* 108 S.Ct. 147 (1987) 19

Nichols v. Rysavy, 809 F.2d 1317 (8th Cir.), *cert. denied* 108 S.Ct. 147 (1987) 20

Norfolk Redev. and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Va., 464 U.S. 30 (1983) 12

United States v. Public Utilities Commission of California, 345 U.S. 295 (1953) 11

United States v. Western Pac. RR., 352 U.S. 59 (1956) 21

STATUTES, REGULATIONS AND RULES

16 U.S.C. 818 (Federal Power Act, § 24) 2, 7

28 U.S.C. 1491(a)(1) 5

28 U.S.C. 2409a (Quiet Title Act) 18

28 U.S.C. 2409a(g) 9, 15, 18

43 U.S.C. 141 (Pickett Act) (repealed) 7

Alaska Native Claims Settlement Act (ANCSA),

43 U.S.C. 1601 *et seq.* 1

43 U.S.C. 1601(a) (ANCSA § 2(a)) 6, 10

43 U.S.C. 1601(b) (ANCSA § 2(b)) 6

43 U.S.C. 1603(b) (ANCSA § 4(b)) 1

43 U.S.C. 1607(a) (ANCSA § 8(a)) 1

43 U.S.C. 1610(a) (ANCSA § 11(a)) 4

43 U.S.C. 1610(b) (ANCSA § 11(b)) 1

43 U.S.C. 1611(a)(1) (ANCSA § 12(a)(1)) 1

TABLE OF AUTHORITIES—Continued

	Page
43 U.S.C. 1613(a) (ANCSA § 14(a))	1
43 U.S.C. 1613(c)(1) (ANCSA § 14(c)(1)	*Passim*
43 U.S.C. 1613(g) (ANCSA § 14(g))	5, 14
43 U.S.C. 1621(b) (ANCSA § 22(b)	*Passim*
43 U.S.C. 1621(j)(2) (ANCSA § 22(j)(2))	20
43 U.S.C. 1632(b) (ANCSA § 33(b))	16
43 C.F.R. § 2650.3-1(a)	17
Fed. R. Civ. P. 19(a)	19
Fed. R. Civ. P. 19(b)	15, 19, 21
Pub. L. 94-579, Section 704(a), 90 Stat. 2792	7

OTHER AUTHORITIES

2A Sutherland Statutory Construction (4th Ed. 1984)	11
26 Fed.Reg. 2486 (1961)	3
117 Cong. Record 46781, 46785-86, 46788 (Dec. 14, 1971)	10

STATEMENT OF THE CASE

This case concerns the ownership of sixty-five acres of land in the Eagle River Valley near Anchorage, Alaska. Long before any white settlement, the Eagle River Valley was encumbered by aboriginal title and by traditional subsistence use and occupation of the valley by Alaska Natives.[1] These traditional claims of aboriginal title by the Natives were formally presented for adjudication before the Indian Claims Commission in 1953.[2] Donnelly App. E[3] at 84a. These claims were extinguished by § 4(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* 43 U.S.C. 1603(b). Pursuant to ANCSA, Eklutna, Inc.[4] ("Eklutna") was formed as the Village Corporation which includes as shareholders the Natives of the area where the disputed land is found. 43 U.S.C. 1607(a), 1610(b). Eklutna selected and received patent to the surface estate to lands, including that currently in dispute, as settlement of their aboriginal claims. 43 U.S.C. 1611(a)(1), 1613(a).

---

[1]The term "Natives" in Alaska includes Indians, Aleuts, and Eskimos.

[2]Even earlier, all the lands in the Eagle River Valley which are relevant to this case had been part of the Eklutna Reserve established under the Indian Reorganization Act. Donnelly App. E at 84a.

[3]"Donnelly App." refers to the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in *Donnelly v. United States*, no. 88-533. "Pet. App. E" refers to the Findings of Fact in the district court decision in that case, A75-27 Civil, United States District Court for the District of Alaska, February 5, 1981.

[4]Pursuant to Supreme Court Rule 28.1, Eklutna, Inc. has no parent company or subsidiary, except wholly-owned subsidiaries.

In 1957, James Lee ("Lee" or "petitioner") entered 160 acres, including the land now in dispute, to homestead it. CR[5] 87 (BLM files). The entry occurred thirty-two years after Power Site Classification ("PSC") 107 had withdrawn the disputed land from appropriation under the public land laws for power site purposes under Section 24 of the Federal Power Act, 16 U.S.C. 818, and seven years after PSC 399 had also withdrawn the land. Donnelly, App. E at 60a. Although in 1952 the Federal Power Commission ("FPC") determined that the value of the disputed land would not be injured or destroyed for the purposes of power development by location or entry, *id.* at 61a, the Secretary of Interior never acted pursuant to to Section 24 of the Federal Power Act to revoke the withdrawal, and the land therefore remained closed to entry.

At the time Lee filed his notice of location, he was notified in writing that "OCCUPANCY OR USE IS AT YOUR OWN RISK UNTIL FURTHER NOTICE FROM THE LAND OFFICE." CR 87. In 1958, Lee was advised in a letter from the FPC that, "We do not find that any restoration to entry of the subject lands has yet been made. Restoration is a function of the Bureau of Land Management . . . ." CR 76, Ex. 4. In February 1959, Lee and other settlers in the area sent a letter to the Secretary of the Interior asking for a clarification of their situation. CR 108, Ex. K. The Assistant Secretary responded in March of that year, stating that the settlement could not be recognized under existing law, that Lee was in trespass, and that even if the lands were re-opened to entry, Lee would

---

[5]"CR" refers to court record in the Lee case, no. A79-336, United States District Court for the District of Alaska.

not have preference rights. CR 108, Ex. L. These positions were repeated in a letter sent by the BLM in August 1959, which also denied Lee's entry. CR 80.

In 1961, BLM filed a platted survey of the area that delineated, *inter alia,* the boundaries of Classification 399 in relation to the potential homestead sites selected by petitioners. 26 Fed.Reg. 2486 (1961). Immediately afterwards, on April 27, 1961, BLM issued final decisions rejecting Lee's entry insofar as they conflicted with the power site withdrawal. Donnelly App. C at 36a.

Nevertheless, Lee filed a homestead entry final proof covering 160 acres in 1962. CR. 87. However, his final proof indicated a deficit in his cultivation requirements. *Id.*. Thereafter, Lee and his attorney met with the BLM to attempt a compromise. CR 87; CR 76, Ex. 20. Lee was allowed to "clarify" his final proof testimony at which time he increased the amount of acreage he claimed cultivated. He was required to build a habitable dwelling on the 95 acres located outside the withdrawn area and cultivate acreage in this area. CR 87. His prior residency on lands withdrawn from entry was considered "constructive" for purposes of gaining title to the 95 available acres. CR 76, Ex. 21, 22, 23.

Lee accepted the compromise. He submitted the proof of construction of a habitable dwelling and cultivation as required. CR 87. Although he was represented by legal counsel, Lee did not appeal the BLM's decision not to grant him the withdrawn 65 acres. CR 76, Ex. 21. In November, 1964, patent was issued to Lee for the 95 acres outside the power reserve. CR 76, Ex. 25. Lee thereafter had no application pending for additional acreage and took no fur-

ther action to pursue his original homestead claim. However, in 1967, Lee petitioned the BLM for restoration of the disputed land, which would have opened the land to homestead entry by interested persons. CR 87. Lee's petition was rejected in 1968, which decision was affirmed by the national office. Lee did not make further appeal to the Secretary. *Id.*

In 1970, Lee was served with a trespass notice, directing him to vacate the 65 acres inside the power reserve. In compliance with that notice, Lee moved off the land by November 1971. CR 105, 121 (Lee deposition pages 46-47, 181.)

Upon the adoption in December 1971 of ANCSA, the disputed land was again withdrawn to allow for selection and conveyance to Native corporations in settlement of their aboriginal claims. 43 U.S.C. 1610(a). Eklutna, Inc. ("Eklutna") selected the disputed land, the required notice was given by publication, and patent was issued to Eklutna in 1979. CR 87. Having compromised and settled his claims in 1963-64, *Lee v. United States,* 629 F.Supp. 721, 724-25 (D.Alaska 1985), and having no applications pending, Lee was no longer of record at this time.

Fifteen years after accepting the settlement and receiving patent to 95 acres, Lee filed a complaint in federal district court against the United States and Eklutna. CR 1. The case was consolidated with similar cases filed by two other claimants. CR 61. Lee sought patents from the United States to the portion of Eklutna's land for which he had sought to make homestead entries. He also sought conveyance from Eklutna on a variety of grounds: that Eklutna held the land subject to a constructive trust for the

benefit of Lee; that he was entitled to conveyance of the land as a homestead under ANCSA § 22(b), 43 U.S.C. 1621(b); that he was entitled to the land on the grounds that he had "prior existing rights" under ANCSA § 14(g), 43 U.S.C. 1613(g); that he was entitled to the land as its occupier under ANCSA § 14(c)(1), 43 U.S.C. 1613(c)(1), which requires a Native Village corporation to convey land to, *inter alia*, a person who occupies it as a principal place of residence.[6] See *Lee v. United States, supra* at 725.

In January, 1985, the district court granted judgment in favor of the United States and Eklutna on all claims except the claim under ANCSA § 14(c)(1). *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985). The judgment of the district court was affirmed on appeal. 809 F.2d 1406 (9th Cir. 1987). This Court denied Lee's Petition for Certiorari under the name *Lee v. Eklutna, Inc.*, — U.S. —, 108 S.Ct. 772 (1988).

Lee's § 14(c)(1) claim was consolidated with that of another party, Joseph Donnelly, in *Donnelly v. United States,* No. A75-27 Civil, United States District Court for the District of Alaska. CR-D[7] 284. On November 26, 1986, the district court issued its Findings of Fact and Conclusions of Law granting summary judgment to Eklutna.

---

[6]Lee also filed monetary claims against the United States for an alleged taking of his property. The district court dismissed those claims, holding that because the amount in controversy exceeded $10,000, the Claims Court had exclusive jurisdiction under 28 U.S.C. 1491(a)(1). 629 F.Supp. at 733-34. Lee did not seek review of that ruling in the court of appeals.

[7]"CR-D" refers to the Donnelly Court Record, No. A75-27 Civil, United States District Court for the District of Alaska.

Donnelly App. C at 32a-49a. The court held that individuals cannot assert claims based on ANCSA § 14(c)(1) to the surface estate of lands conveyed to Alaska Native Village Corporations when these lands have been withdrawn from entry by the United States prior to the time that the individuals entered and remained upon them. *Id.* at 33a-34a, 42a. The court further held that the lands at issue were validly withdrawn as part of Power Site Classifications 107 and 399, and that they were never subsequently restored to public entry under the public land laws. *Id.* at 42a.

The district court rejected the contention that all that is required for an individual to obtain rights to village corporation lands under § 14(c)(1) is that the person physically "occupied [those lands] as of December 13, 1971 . . . as a primary place of residence, or as a primary place of business, or as a subsistence camp site, or as headquarters for reindeer husbandry," regardless of the status of those lands or the individual's right to use or reside upon them. 43 U.S.C. 1613(c)(1). The court stated that Lee's interpretation of § 14(c)(1) would operate to change the well established principle that individuals could not obtain rights under the public land laws to lands that had been withdrawn from entry by the federal government. Donnelly App. 43a (citations omitted). The court also felt it was "inconceivable" that Congress intended to reward trespassers at the expense of Alaska Natives when ANCSA was intended to provide "a fair and just settlement" of all native land claims to serve "the real economic and social needs of [Alaska's] natives." 43 U.S.C. 1601(a)-(b). The court stated that it would be "peculiar" for such a statute

to transform an individual's trespass into valid title. Donnelly App. C at 44a.

In an attempt to avoid trespasser status, Lee and Donnelly argued that they had equitably vested title to the disputed lands because those lands were not validly withdrawn when they initiated their claims. Lee and Donnelly contended that Power Site Classifications 107 and 399 did not constitute orders withdrawing lands from entry because they did not contain the word "withdraw" and that the Secretary of the Interior could not exercise the President's authority to withdraw lands for power purposes under the Pickett Act, 43 U.S.C. 141 (repealed October 21, 1976 by Pub. L. 94-579, Section 704(a), 90 Stat. 2792). The court rejected those arguments. Donnelly App. C 45a-46a. The court also rejected the claimants' contention that, even if the 1925 and 1950 orders validly withdrew the lands, § 24 of the Federal Power Act, 16 U.S.C. 818, required that the lands automatically became open to public entry when the Federal Power Commission issued its "no-injury" determination in 1952. The court held that § 24 is not "self-executing" and that it explicitly "contemplates action by the Secretary to terminate the [withdrawal] classification." Donnelly App. C at 47a, citing *Buch v. Morton*, 449 F.2d 600 at 607 (9th Cir. 1971). Because the Secretary did not issue an express order restoring the lands to entry, the lands remained withdrawn. Donnelly App. C at 48a. Moreover, the court further noted that, even if the Secretary had issued such an order, the State of Alaska would have been entitled to the first-preference rights, and qualified veterans would have had a superior right to other claimants, such as Lee and Donnelly. Donnelly App. C at 48a.

Following certifications under Civil Rule 54(b), Lee and Donnelly appealed[8]. The Ninth Circuit ruled against Lee and Donnelly in a decision filed on March 10, 1988 and amended on June 27, 1988. *Donnelly v. United States*, 841 F.2d 968 (9th Cir. 1988).[9] The court affirmed the district court's holding that ANCSA § 14(c)(1) could not operate as an amnesty provision extending rights to individuals who are merely trespassers, failed homesteaders, or land users without any vested rights prior to December 18, 1971 because there was no indication of congressional intent to override the established principal that individuals could obtain no rights to withdrawn lands. 841 F.2d at 975. In so ruling, the court approved the district court's position that congressional intent to provide a "just and fair settlement" of native land claims is inconsistent with an interpretation of § 14(c)(1) that would reduce the land patented to native corporations in favor of trespassers. *Id.*

The court also ruled against Lee on his claim that he was not a trespasser for the purposes of § 14(c)(1) by virtue of title having equitably vested before ANCSA withdrew all lands in 1971. Not deciding this issue on the merits of such title, the court ruled that such title was based on a homestead claim. Adopting the reasoning

---

[8]Only Eklutna's claims for ejectment are still pending.

[9]The reported decision is not the Amended Opinion, which is set forth at Donnelly App. A. The decisions differ in that the Amended Opinion contains a reference to a case decided by the Alaska Supreme Court during the period between the two court of appeals' decisions, *Hakala v. Atxam Corp.*, 753 P.2d 1144 (Alaska 1988). Donnelly App. A at 16a, n.9. *See infra* at pp. 13 to 14.

from the *Lee* district court decision, 629 F.Supp. 730-32, that ANCSA could not require Native corporations to resolve the merits of a homesteader's title dispute with the government, the court of appeals held that the United States was an indispensable party to a determination of a § 14(c)(1) claim based on a disputed homestead claim. In order to challenge the validity of the patents to Eklutna, Lee had to establish his own entitlement to the disputed lands, which he could do only in direct proceedings against the United States. The United States could not be made a party because the statute of limitations had run under the Quiet Title Act, 28 U.S.C. 2409a(g). *Donnelly, supra* at 974-975. Therefore, Lee's and Donnelly's claims were dismissed.

Lee then filed this petition for certiorari. Donnelly has also filed a petition for certiorari on the § 14(c)(1) issue and others, entitled *Donnelly v. United States,* no. 88-549.

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

In affirming the district court's grant of summary judgment against Lee, the court of appeals correctly held that the language and intent of ANCSA § 14(c)(1) do not require that trespassers be awarded land at the expense of Native Corporations, the intended beneficiaries of ANCSA, and that the United States is an indispensable party to an ANCSA § 14(c)(1) claim based on a homesteading claim. The court of appeals' decision does not conflict with any decision of this Court, any decision

of another court of appeals, or with any decision of a state court of last resort. The decision does not present a question of general importance that should be reviewed by this Court.

I. ANCSA WAS INTENDED TO BENEFIT ALASKA NATIVES, NOT TO BENEFIT TRESPASSERS.

ANCSA was enacted in 1971 as a comprehensive settlement of the claims of Alaska Natives based upon aboriginal title. 43 U.S.C. 1601(a); 117 Cong. Record 46781, 46785-86, 46788 (Dec. 14, 1971). Its overall purpose is to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims . . ." 43 U.S.C. 1601(a). Congress further intended that ANCSA be liberally interpreted in favor of the Natives. *Cape Fox Corp. v. United States,* 4 Cl.Ct. 223, 231 n. 11 (1983).

Notwithstanding the fact that it is absurd to contend that a comprehensive status enacted to settle Native claims and to be liberally construed in favor of the Natives somehow grants rights to a trespasser like Lee, he argues that §14(c)(1) states in plain terms that an individual who occupied land in Alaska on December 18, 1971 is entitled to receive a deed.[10] Lee seeks to isolate a single clause in

---

[10]Lee's claim of occupancy is dubious because he did not actually occupy the disputed land on December 18, 1971. In his Petition for Certiorari at p. 6, Lee claims that he has lived on the "unitary" 160 acre tract since 1958, except for a period of military service. Without citation to the record below, he further claims that after being served with a Notice of Trespass by the BLM in 1971, he removed "some of his improvements"

(Continued on following page)

a much larger statute, which is in turn but one part of the entire body of the public land laws. The proper approach for interpreting § 14(c)(1) is to construe that provision in light of ANCSA as whole, giving equal weigh to all provisions in the enactment and construing the overall act so as to harmonize its various provisions. 2A SUTHERLAND STAT. CONST. §§ 46.05, 47.02 (4th Ed. 1984).

Section 14(c)(1) cannot be read in literal terms where the literal meaning would produce absurd results. *United States v. Public Utilities Commission of California,* 345 U.S. 295, 315 (1953). If Lee is correct in asserting that § 14(c)(1) applies in this situation, then every rejected homestead entryman, every unsuccessful applicant for a trade and manufacturing site or headquarters site, and every person who has failed to lawfully acquire a small tract entry, will have vested rights under § 14(c)(1). Lee's interpretation would sweep aside all applicable land laws concerning homesteads, trade and manufacturing sites, headquarters sites, and small tracts. Yet there is nothing in § 14(c)(1) or any other part of ANCA which repeals these laws. On the contrary, ANCSA § 22(b) concerning homesteads makes it clear that these laws are to be fully enforced.

Even worse, under Lee's interpretation, willful trespass and knowing violation of the public land laws would

---

(Continued from previous page)

from the disputed land. However, in his deposition, Lee admitted that he removed his physical improvements from the disputed land. This Opposition, *supra* at 4. Apparently, Lee is trying to treat residence on the 95 acres he accepted as a compromise to his homestead claim as residence on the remaining 65 acres. Lee cannot show he occupied as a primary place of residence any more than the land he received as a homestead.

be rewarded under § 14(c)(1). Since § 14(c)(1) clearly requires occupancy, a rejected entryman who obeyed the public land laws, relinquished his or her unlawful entry, and moved off the land prior to ANCSA could gain no rights under § 14(c)(1). Those who stayed in spite of the rejection of their unlawful entries, trespass notice, and full knowledge that they had no right to entry or occupancy, would be entitled to benefits under § 14(c)(1).

Although the language of § 14(c)(1) contains only a reference to occupancy, it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *California Fed. Sav. and Loan Ass'n. v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 691 (1987), quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). As in all cases of statutory construction, this Court's task is to interpret the words of the statute in light of the purposes Congress sought to serve. *Norfolk Redev. and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983). ANCSA was never designed to be remedial legislation for homesteaders whose entries had been rejected. Since ANCSA was enacted for the purpose of remedying prior wrongs and neglect suffered by the Native peoples of Alaska, it must be construed in light of this purpose. Lee's interpretation is not just inconsistent with the spirit of ANCSA, it would actually defeat the basic intent of the Act.

II. THE ALASKA SUPREME COURT HAS NOT HELD THAT § 14(c)(1) OFFERS AMNESTY TO TRESPASSERS.

Lee maintains that the "gist" of his petition is whether the courts should "transpose" the limitations of the home-

stead laws to § 14(c)(1) reconveyances. Petition at 15. He argues that in *Hakala v. Atxam Corporation,* 753 P.2d 1144 (Alaska 1988), the Supreme Court of Alaska adopted a reading of § 14(c)(1) that held that there were "no conditions under that statute to preexisting titles or withdrawals." Petition at 21. Lee implies that the decision in *Hakala* is in conflict with the court of appeals' decision in this case. Petition at 16. Lee's characterization of the *Hakala* case is erroneous, because the Alaska Supreme Court found that a condition to a § 14(c)(1) reconveyance was legal occupancy. That finding was echoed in *Buettner v. Kavilco, Inc.*, — F.2d —, 1988 West Law 111344 (October 26, 1988) (9th Cir. 1988).

In *Hakala,* the Alaska Supreme Court held that a hunting guide was entitled to a § 14(c)(1) reconveyance of a hunting cabin and curtilage used as a primary place of business. The Alaska Supreme Court saw "the primary issue" as being "how the court should interpret the phrase 'a primary place of business' as contained in § 14(c)(1) of ANCSA." 753 P.2d at 1147. The court perceived the phrase "a primary place of business" as effectuating Congress' intent to protect a "wide array of existing legitimate businesses," those who were using the lands in "an *established, legal* and *routine* fashion." *Id.* (Emphasis added.) The court in *Hakala* was apparently not confronted with a trespasser or a claimant who was on the land illegally. Although the decision by the court of appeals in this case was apparently not brought to the attention of the Alaska court, the Alaska court clearly recognized that a claimant under § 14(c)(1) must be legally on the land in order to state a claim, a status which Lee did not have.

In an extremely recent decision, the Ninth Circuit has noted that *Hakala* is consistent with an interpretation of § 14(c)(1) that denies a right of reconveyance to illegal occupants but grants a right to legal occupants. *Buettner v. Kavilco, Inc., supra.* In that case, the plaintiff, who held a special use permit from the United States Forest Service to build a year-round residence on land selected by the defendant Native corporation, sought reconveyance of the land pursuant to § 14(c)(1). The court of appeals held that the plaintiff's status as a "prior existing right" under ANCSA § 14(g) (43 U.S.C. 1613(g)) did not preclude a claim under § 14(c)(1). 1988 West Law 111344 at p. 2. Noting that the decision of the court of appeals in this case denied rights under § 14(c)(1) to trespassers, the court found that the plaintiff was legally on the land by virtue of the Forest Service permit and that the *Hakala* decision also recognized the rights of legal occupants. 1988 West Law 111344 at pp. 2-3.

Thus, the courts that have considered the matter have consistently stated that § 14(c)(1) grants rights only to legal occupants, not illegal ones. Both the federal and Alaska state courts are in agreement on that point. For that reason, Lee misses the point when he characterizes the gist of this case as being the transposition of homestead law onto ANCSA. The gist of this case is his own invalid occupancy, which Congress clearly did not intend to be a basis for a claim under § 14(c)(1).

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO LEE'S CLAIM TO A HOMESTEAD.

As discussed above at pp. 7-9, Lee attempted to show legal occupancy by claiming that he had equitable vested title to the disputed land. The court of appeals correctly dismissed this claim without reaching the merits. The court reasoned that such a claim was essentially a homestead claim against the United States; the statute of limitations on the homestead claim had run under the Quiet Title Act, 28 U.S.C. 2409a(g), so that the United States could not be made a party; dismissal was required under Fed. R. Civ. P. 19(b) because the United States was an indispensable party. 841 F.2d at 975. In his Petition, Lee never directly asks for reversal of this ruling, perhaps in recognition that he had previously substantially litigated the indispensable party issue and lost. *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee V. Eklutna, Inc.,* — U.S. —, 108 S.Ct. 772 (1988). See pp. 5-6, *supra.*

The court of appeals correctly determined that Lee's claim under § 14(c)(1) based on equitably vested title was essentially a homestead claim. Although Lee never argues that his occupancy arose from anything other than an attempt at homesteading, the argument is indirectly made that the § 14(c)(1) claim is independent from the homestead claim. *See,* Petition at 21 ("By enacting § 14(c)(1) Congress intended a new, independent grant to arise as of the date of conveyance . . . . "). Under this theory, § 14(c)(1) would also have to protect lawful homestead entries, since Congress could never be deemed to have pro-

tected unlawful entries while sacrificing lawful ones. But Congress obviously did not agree with Lee's interpretation of § 14(c)(1). In order to protect valid homestead entries, it was deemed necessary to add ANCSA § 22(b), which deals with homestead claimants, and even more specifically with homestead claimants who had not performed all requirements of law for a patent, as evidenced by receiving certificate of final proof. As to claimants who had obtained a certificate of final proof, § 22(b) provides that they should receive patent as soon as possible. As to claimants who had not obtained a certificate of final proof, they would be permitted to perfect their claims and ultimately obtain patent. Section 22(b) would not have been necessary if Congress had originally intended that § 14(c)(1) was to apply to homestead entries.

Thus, § 14(c)(1) does not address persons such as Lee who have made formal entry under the homestead laws. Formal entries upon the public lands pursuant to the homestead laws are governed exclusively by § 22(b), and rights are accorded only to lawful entries in full compliance with the applicable statutes. The court of appeals therefore correctly concluded that Lee's § 14(c)(1) claim is essentially a homestead claim and should be treated as such.

As a further argument that his equitable title claim under § 14(c)(1) should not be treated the same as his homestead claim under § 22(b), Lee also contends that the fact that ANCSA § 33(b) (43 U.S.C. 1632(b)) provides a separate statute of limitations for judicial review of a Native Corporation's § 14(c)(1) decisions is evidence that Congress "believed that § 14(c) had nothing to do either with the Quiet Title Act or the Secretary's land title decisions under ANCSA." Petition at 24-25. In a sense,

Lee is perfectly correct: Congress did not intend that homestead claims under 22(b) could be renewed or relitigated through the "backdoor" of § 14(c)(1). A separate statute of limitations for § 14(c)(1) claims is necessary because of the fact that § 14(c)(1) rights are asserted only after patent of land by the federal government to a Native Corporation, and after the Native Corporation makes the initial determination of a claimant's rights. In contrast, § 22(b) operates *prior to,* rather than following, any ANCSA conveyance: it requires the Secretary of Interior to assess the validity of potential claims that might be raised under the homestead laws before conveying lands involving such claims to native corporations. The Secretary's regulations provide that he will not convey to a Native corporation any land for which he determines that valid homestead entries have been made. 43 C.F.R. §2650.3-1(a). *See, Lee v. United States,* 629 F.Supp. 721, 729-731 (D.Alaska 1985). Therefore, the fact that Congress enacted a statute of limitations for review of a Native Corporation's § 14(c)(1) decisions does not mean that Congress intended to extend or revive homestead claims or to confer new substantive rights on homesteaders.

Having correctly perceived that Lee's § 14(c)(1) claim based on "equitable title" is essentially a homestead claim, the court of appeals correctly applied the reasoning from Lee's previous case in dismissing the § 14(c)(1) claim for the failure to join the United States as an indispensable party. *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee v. Eklutna, Inc.,* — U.S. —, 108 S.Ct.

772 (1988). Claims against the United States for patents to the disputed land are governed by the Quiet Title Act, 28 U.S.C. 2409a. *Id.; Block v. North Dakota,* 461 U.S. 273 (1983). Lee knew or should have known of the United States' claim to the disputed land in 1961 at the very latest when the BLM issued the final decisions denying his homestead claims. *Lee,* 809 F.2d at 1410; *Donnelly, supra* at 974. Because Lee did not file suit until at least fifteen years later, the claim against the United States is barred by the twelve year statute of limitations in 28 U.S.C. 2409a(g). *Id.* Congress intended for section 2409a (g) to apply retroactively. *Block, supra* at 286, n.3.

The court of appeals correctly decided that Lee's equitable title claim had to be dismissed in the absence of the United States as a party. That claim "can only properly establish [his] entitlement to the lands in direct proceedings against the United States." *Lee v. United States,* 809 F.2d at 1411. In order to establish his entitlement to the lands, Lee must show his own entitlement as against the United States. *Id.* at 1410; *Kale v. United States,* 489 F.2d 449, 454 (9th Cir. 1973), *cert. denied* 417 U.S. 915 (1974):

> Kale has no basis for an attack upon the land patent granted to Cord. A United States patent is protected from easy third-party attack. *Hoofnagle v. Anderson,* 20 U.S. (7 Wheat) 212, 5 L.Ed. 437 (1822). It is not sufficient for one challenging a patent to show that the patentee should not have received the patent; he must also show that he (the challenger) is entitled to it. *Duluth & Iron Range RR. v. Roy,* 173 U.S. 587, 590 (1899). (Citation omitted.)

The result of this suit on the merits will depend entirely upon whether Donnelly was entitled to patent from

the United States government. Eklutna is an innocent party, having selected available lands, according to the public records, in settlement of its aboriginal claims. The "United States is the party who issued the fee patent in question, thus setting the entire series of events in motion that resulted in the action." *Nichols v. Rysavy,* 610 F. Supp. 1245, 1253 (D.C.S.D. 1985), *aff'd* 809 F.2d 1317 (8th Cir. 1987), *cert. denied* 108 S.Ct. 147 (1987) (United States held to be an indispensable party to suit challenging the validity of fee patents issued to Native Americans).

Federal Rule of Civil Procedure 19(a) sets forth the conditions for determining if a person ought to be joined as a party,[11] and Rule 19(b) describes the conditions under which a suit should be dismissed if joinder is not possible.

The United States is a party that should be joined under Rule 19(a) because it has an "interest" that would be impaired if Lee were to prevail on the merits against Eklutna: if Eklutna loses this action and has to convey the disputed land to Lee, the United States will have to make up the acreage to Eklutna. As discussed above at pp. 15-17, the court of appeals correctly characterized Lee's § 14(c)(1) claim as a homestead claim. Congress intended

---

[11]Rule 19(a) states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . .

that the Village Corporation's land entitlements not be reduced by homestead claims, which Congress saw as being decided under § 22(b) prior to conveyance to Village Corporations. *Supra* at 16-19. Consistent with this intent, 43 U.S.C. 1621(j)(2) (ANCSA § 22(j)(2)) requires the Secretary of the Interior to make additional acreage available to the Village Corporations for selection and conveyance, if the original selections were inadequate. If Eklutna's land is reduced because it is required to reconvey the disputed land to Lee to satisfy a § 14(c)(1) claim which is essentially a homestead claim, the United States will be required to make up that acreage to Eklutna.

Thus, whether the United States will be deprived of additional land depends precisely on whether Lee prevails in his suit against Eklutna. But "the government's liability cannot be tried behind its back." *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945), cited in *Nichols v. Rysavy*, 809 F.2d 1317, 1333 (8th Cir.), *cert. denied*, 108 S.Ct. 147 (1987) (United States was indispensable party to suit attacking fee patents to Native Americans.)[12]

---

[12]The United States may also have an interest because resolution of this case would turn on a variety of factual and legal issues that directly implicate the interests of the United States—e.g., whether the Secretary of the Interior erred when he determined that the land within the withdrawal area was not available for homestead entry, whether Lee otherwise complied with the homestead laws, whether other persons would have had superior claims to the lands, and whether Lee abandoned or compromised his claims in the 1960's. In the normal course, all of these questions would be decided by the Secretary in the

(Continued on following page)

An analysis using the four-part test provided in Rule 19(b) that must be applied in each case to determine whether, in equity and good conscience, the action should proceed in the absence of the United States shows that the court of appeals correctly determined that the action should not proceed. The first part is whether a judgment will prejudice the absent party. Here, the prejudice to the United States is clear. As explained above, the United States will have to make up any land reconveyed under § 14(c)(1) by Eklutna to Lee for his homestead claim.

The second part of the test is whether relief may be shaped to lessen the harm to the absent party. In this case, there appears no way to tailor a judgment in favor of Lee that would lessen the prejudice to the United States. Moreover, a result that would require Eklutna to bear the loss of land conveyed to Lee is unfair, since even Lee does not contend that Eklutna was at fault; any alleged legal error in the circumstances of this case instead is attributable to the federal government in its administration of the public land laws.

The third and fourth parts of the test mentioned in Rule 19(b) are whether a judgment rendered in the United States' absence would be adequate and whether the plaintiff would have an adequate remedy if the action is dismissed for non-joinder. Although these factors are some-

---

(Continued from previous page)

first instance under the doctrine of primary jurisdiction (see, e.g., *United States v. Western Pac. RR.*, 352 U.S. 59, 63-64 (1956), and the Secretary would be a party to any suit seeking judicial review. This interest was asserted by the government in the Brief for the Federal Respondents in Opposition to Lee's previous petition for certiorari. No. 87-642.

what in favor of not requiring dismissal of Lee's claim to equitable title, it should be noted that the latter part of the test is not particularly compelling: at one time, Lee did have an adequate remedy in the nature of a suit against the United States, but he voluntarily allowed the statute of limitations to run.

Thus, "equity and good conscience" hardly compel allowing Lee's claims against Eklutna to proceed in the absence of the United States. Lee's problems are of his own making, and they are not of Eklutna's making. By no later than 1961, he knew of the government's position that the land was not available for homesteading, but he failed to bring suit for more than eighteen years. If Lee had sued in a timely manner, the government would have been a defendant. If Lee had prevailed, the disputed lands could have been excluded from the grants to Eklutna.

In light of Lee's lack of diligence and in light of the basic unfairness to Eklutna arising from having to resolve the merits of Lee's homestead claim against the government, the court of appeals' conclusion that the United States is an indispensable party squarely comports with "equity and good conscience."

IV. THE DECISION BELOW WAS JUSTLY DECIDED AND IS OF LIMITED IMPACT.

Although of great importance to Eklutna, this case will have no practical impact outside the state of Alaska. Even within the state, its impact will be limited to failed homesteaders of lands conveyed to Native Corporations. Eklutna does not know how many such failed homesteaders there are, but there are almost certainly not the "thou-

sands" Petitioner alleges (Petition at 27) without the slightest shred of evidence in the record.

This case involves nothing more than the argument of a failed homesteader that ANCSA, which was enacted for the benefit of Alaska's Natives, provides him with amnesty from his failure to comply with the provisions of federal law concerning homesteads and, thereby, entitles him to sixty-five acres in addition to the ninety-five he has already received. The district court's and the court of appeal's interpretation of § 14(c)(1) that distinguishes between legal and illegal occupants, whether Native or non-Native, is just and fair.

———o———

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID P. WOLF
JAMES S. CRANE

Counsel for Respondent, Eklutna, Inc.

COPELAND, LANDYE, BENNETT AND WOLF
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

APPENDIX[13]

28 U.S.C. 1491(a)(1)

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

43 U.S.C. 141 (repealed)

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

---

[13]Petitioner did not submit an appendix, apparently relying on the appendix submitted in the related case, *Donnelly v. Eklutna, Inc., et al.*, no. 88-533 (pending). Eklutna will similarly utilize the Donnelly Appendix, as supplemented by this appendix.

43 U.S.C. 1603. Declaration of Settlement

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

43 U.S.C. 1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

43 U.S.C. 1610. Withdrawal of public lands

(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(1) The Native villages subject to this chapter are as follows:

NAME OF PLACE AND REGION

* * * *

Eklutna, Cook Inlet

43 U.S.C. 1611. Native Land Selection

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided,* that no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610 (a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further,* That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation for that region may select the subsurface estate in an equal acreage from other lands withdrawn by section 1610(a) of this title within the region, if possible.

Fed. R. Civ. P. 19(b) *Determination by Court Whenever Joinder Not Feasible*

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dis-

missed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

MOTION FILED
DEC 5 1988

(3)

No. 88-549

In the
Supreme Court of the United States

OCTOBER TERM, 1988

JAMES W. LEE, PETITIONER,

v.

EKLUTNA, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Motion for Leave to File Brief as *Amicus Curiae* and Brief of Fifty-Nine Alaska 14(c) Claimants as *Amicus Curiae* in Support of Petition

---

G. KENT EDWARDS, *Esq.*
HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

88-549

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES W. LEE, PETITIONER,

v.

EKLUTNA, INC., et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF 59 ANCSA 14(c) CLAIMANTS
IN SUPPORT OF PETITIONERS

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, ANCSA 14(c) Claimants[1/] respectfully move for leave to file the attached brief Amicus Curiae; in support of the Petitions filed by Donnelly and Lee.

1/ Alan Abramson, Michelle Abramson, L. Ann Barker, William H. Barker, Bernard P. Burkholder, Jody M. Burkholder, Marianne Burkholder, Nina Lee Burkholder, Becky A. Carlson, Stanley D. Carlson, D. Chester Cantley, Esther E. Cantley, Donna J.

(Footnote continued on following page)

The Solicitor General has consented to such participation as Amicus Curiae. A copy of his consent is attached as Exhibit "A". Eklutna would not give its consent. No explanation was given. Consequently, this motion is submitted and supported by the following points:

1. Said fifty-nine individuals and companies have 14(c) claims under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq ("ANCSA). The Ninth

---

(footnote continued from preceding page)

Darrough, Robert D. Darrough, David W. Dieters, Rita R. Dieters, Benton A. Evans, Chuck Evans, Fields & Sons, Inc., Dewitt Fields, Duncan S. Fields, Wallace W. Fields, Wanda A. Fields, Weston W. Fields, Joy L. Guthrie, Richard L. Guthrie, JoAnn M. Graves, Stanley R. Graves, Clistia Jones, Elisabeth Kouremetis, Leo Kouremetis, Patrick J. Killion, Sandra C. Killion, Patricia A. Kust, Peter J. Kust, Marla Krigbaum, Morris C. Krigbaum, John E. Libby, Phyllis L. Libby, Frances Bruce Luque, Tana Cochran-Luque, Kathryn Madson, Richard R. Madson, Blanche L. Murphy, Jane E. Nuttall, John P. Nuttall, Mary Jo Nuttall, Michael J. Nuttall, Celestine O. Omlid, Darlene L. Omlid, Oluf K. Omlid, Sid M. Omlid, James R. Pryor, Donald P. Sagmoen, Helen E. Sagmoen, Claude D. Slater, Togiak Fisheries, Inc., Clarence Wren, and V. May Wren.

Circuit's decision in the above-referenced matter, exposes each of them, and all others similarly situated, to eviction from their homes or business property which they and their predecessors-in-interest have occupied for over twenty years. Unlike Donnelly or Lee, the Amicus Curiae are not failed homesteaders; none were the subject of eviction efforts by the U.S. Government. Most are operators of commercial fishing sites; all have spent considerable money improving their remote property, much of it in reliance on the language of ANCSA 14(c).

2. Amicus Curiae participation will help provide insight as to the significance of the ANCSA issues not only to all ANCSA 14(c) claimants; but to all Americans on whose behalf Congress made the historic Alaska Native Land Settlement.

3. The joint Donnelly and Lee decision is a case of first impression on ANCSA 14(c) issues. Until overruled or distinguished, it will control the outcome

of untold thousands of pending and potential 14(c) claims. If this Court does not correct the Ninth Circuit's decision at this time and set forth policy guidelines for ANCSA 14(c) claims, it will be too late to do so in future cases. The result will be uncorrectable damage and injustice since few, if any, of such claimants can afford the cost of taking their ANCSA 14(c) claims all the way through the federal judicial system in the face of the Donnelly/Lee decision on the mere hope this Court will grant review in their own cases.

4. The interests of the fifty-nine 14(c) Claimants differ from that of Petitioners, in that Donnelly/Lee were principally interested in obtaining broader relief in the courts below under the Homestead Act in order to receive title to more acreage than would be the case under ANSCA 14(c). The order and emphasis of the issues in both the briefs and decisions below reflect such different focus. The

interest of the fifty-nine Claimants is limited solely to the ANSCA 14(c) issue, an issue which has thus far been treated as an afterthought, despite its crucial importance and far reaching ramifications.

5. Counsel for the Amicus Curiae was Alaska's Attorney General when the Alaska Native Claims Settlement Act ("ANCSA") legislation was originally working its way through Congress. He is familiar with its legislative history. To date the courts below have rendered their decisions without the benefit of highly relevant legislative history which supports a conclusion contrary to that reached by the Ninth Circuit.

Respectfully submitted,

G. Kent Edwards, Esq.
HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS

OCT 18 1988
H.C. 11:17
ANCHORAGE, ALASKA

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

October 17, 1988

G. Kent Edwards
Hartig, Rhodes, Norman, Mahoney & Edwards
717 K Street
Anchorage, Alaska 99501-3397

Re: Donnelly v. Eklutna, et al., No. 88-533

Lee v. Eklutna, et al., No. 88-549

Dear Mr. Edwards:

This is in response to your letter of October 14, 1988.

On behalf of the federal parties I hereby consent to the filing of an amicus curiae brief on behalf of the forty two Alaska Native Claims Settlement Act claimants in the above cases.

Sincerely,

Charles Fried

Charles Fried
Solicitor General

EXHIBIT "A"

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
QUESTIONS PRESENTED FOR REVIEW.....	1
INTEREST OF AMICUS CURIAE.....	2
REASONS FOR GRANTING CERTIORARI AND SUMMARILY REVERSING	
A. THE NINTH CIRCUIT'S 14(c) HOLDINGS WERE MADE WITHOUT BENEFIT OF HIGHLY RELEVANT LEGISLATIVE HISTORY WHICH SUPPORTS A CONTRARY RESULT.....	3
B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE ALASKA SUPREME COURT IN HAKALA v. ATXAM CORP.....	7
C. THE NINTH CIRCUIT'S DECISION RENDERS ANCSA 14(c) MEANINGLESS.....	9
D. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE DEPARTMENT OF INTERIOR IN APPEAL OF THEODORE J. ALMASY...	10
E. ANCSA 14(c) RIGHTS ARE NOT IMPAIRED BY WITHDRAWALS FOR PURPOSES OTHER THAN NATIONAL PARKS OR MILITARY DEFENSE.....	11
F. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY IN ANCSA 14(c) ACTIONS BETWEEN OCCUPANTS AND NATIVE CORPORATIONS.....	13
G. THE QUIET TITLE ACT STATUTE OF LIMITATIONS IS NOT APPLICABLE TO ANCSA 14(c) CLAIMS.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases:

Alaska Miners v. Andrus, 662 F.2d 577, 570 (9th Cir. 1981).....11,13

Hakala v. Atxam Corp., 753 P.2d 1144 (Alaska 1988)..... 7,8,9

Appeal of Theodore Almasy, 87 I.D. 81, 85 (February 27, 1980)..... 10,11

Statutes:

28 U.S.C. 2409a(g)
43 U.S.C. 1616(d)(2)(1971)..... 1,14,15
Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, et seq:
43 U.S.C. § 1602(e)..... 12,13
43 U.S.C. § 1610 (1971)..... 12
43 U.S.C. § 1612..... 14
43 U.S.C. § 1613(a)(1)..... 10,14
43 U.S.C. § 1613(c)..... 1,2,3,4, 6,7,9, 10,13,14
43 U.S.C. § 1616(d)(2)(1971).... 11
43 U.S.C. § 1621(b)..... 10
43 U.S.C. § 1632(b)..... 1,15
43 U.S.C. 1701, et seq..... 7
1884 Organic Act, § 8, 23 Stat. 24..... 5,6

Regulations:

43 C.F.R. 9230..... 7

Other Authorities:

Statement of Joseph Fitzgerald, Hearing before the Committee on Interior and Insular Affairs, U.S. Senate, 91st Cong., 1st Sess. (1969) (Senate Bill 1830)..... 3,4.5

QUESTIONS PRESENTED

1. In passing the Alaska Native Claims Settlement Act ("ANCSA") did Congress intend that Native and non-native squatters be dispossessed of their places of residence and business even though they, or their predecessors-in-interest, occupied the lands before December 1971 in the manner specified for conveyance eligibility under Section 14(c) of that Act?

2. Did Congress intend that the United States of America be treated as an indispensable party in ANSCA 14(c) claim cases?

3. Did Congress intend that ANCSA 14(c) claims be governed by the statute of limitations contained in the Quiet Title Act, 28 U.S.C. 2409a(g), rather than that contained in 43 U.S.C. 1632(b)?

INTEREST OF THE 59 ALASKAN AMICUS CURIAE

The interest of the fifty-nine Alaska Alaska Native Claims Settlement Act 14(c) claimants[1/] (hereinafter "ANCSA claimants") requesting permission to appear as Amicus Curiae, is set forth in their Motion For Permission To Appear, which statements are incorporated herein by reference.

1/ Alan Abramson, Michelle Abramson, L. Ann Barker, William H. Barker, Bernard P. Burkholder, Jody M. Burkholder, Marianne Burkholder, Nina Lee Burkholder, Becky A. Carlson, Stanley D. Carlson, D. Chester Cantley, Esther E. Cantley, Donna J. Darrough, Robert D. Darrough, David W. Dieters, Rita R. Dieters, Benton A. Evans, Chuck Evans, Fields & Sons, Inc., Dewitt Fields, Duncan S. Fields, Wallace W. Fields, Wanda A. Fields, Weston W. Fields, Joy L. Guthrie, Richard L. Guthrie, JoAnn M. Graves, Stanley R. Graves, Clistia Jones, Elisabeth Kouremetis, Leo Kouremetis, Patrick J. Killion, Sandra C. Killion, Patricia A. Kust, Peter J. Kust, Marla Krigbaum, Morris C. Krigbaum, John E. Libby, Phyllis L. Libby, Frances Bruce Luque, Tana Cochran-Luque, Kathryn Madson, Richard R. Madson, Blanche L. Murphy, Jane E. Nuttall, John P. Nuttall, Mary Jo Nuttall, Michael J. Nuttall, Celestine O. Omlid, Darlene L. Omlid, Oluf K. Omlid, Sid M. Omlid, James R. Pryor, Donald P. Sagmoen, Helen E. Sagmoen, Claude D. Slater, Togiak Fisheries, Inc., Clarence Wren, and V. May Wren.

REASONS FOR GRANTING CERTIORARI AND SUMMARILY REVERSING.

A THE NINTH CIRCUIT'S 14(c) HOLDINGS WERE MADE WITHOUT BENEFIT OF HIGHLY RELEVANT LEGISLATIVE HISTORY WHICH SUPPORTS A CONTRARY RESULT.

A review of the briefs below and resulting court decision indicate that the Ninth Circuit was unaware of the relevant legislative history of ANCSA 14(c). [43 U.S.C. 1613(c)] That history can be found in Hearing before the Committee on Interior and Insular Affairs, U.S. Senate 91st, Cong., 1st Sess., on S. 1830 [hereinafter Senate Bill 1830]. Senate Bill 1830 was the legislative stone from which the ANCSA settlement was carved by Congress.

The legislative history of Senate Bill 1830 confirms that it was deemed essential to the structure of the settlement that nobody be dispossessed from their home, businesses, or subsistence camp sites located upon the ANCSA settlement lands.

Section 14(c) ANCSA has its origin in Section 10(a) of Senate Bill 1830. That section provides in pertinent part:

> Upon completion of surveys required by section 9 of this Act, the secretary is authorized to issue a patent to the surface of any public lands within the areas withdrawn under the Act to the individual or organization occupying such land at the time of the survey. (emphasis added) Hearing before The Committee on Interior and Insular Affairs, U.S. Senate, 91st Congress, 1st Sess., on S. 1830, p. 29.

At the Senate Interior hearing on Senate Bill 1830, Joseph H. Fitzgerald, Chairman of the task force charged with formulating a legislative resolution of the Alaska native land claims, set forth the reason for making land transfers to "occupants" rather than to a more narrowly defined group:

> The elements of any claims settlement must (1) provide to the village people the land they actually use for homes, businesses, hunting, and fishing camps, and the like; ...
>
> The elements of the proposed settlement are these:

> (1) Land used by the individuals in the villages is transferred directly to them with a minimum of red tape; the villages themselves each become eligible to select up to 36 square miles of surrounding land if they incorporate as organized communities under State law. This provision is the one most immediately important to the village people, who are now in most cases only "squatters" on Federal land. Between 3 and 6 million acres would ultimately be transferred in this way. (emphasis added) Id., p. 121,

The occupancy provision of Senate Bill 1830 was in fact a fulfillment of Section 8 of the 1884 Organic Act, 23 Stat. 24, which provides:

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.... (emphasis added)

The concept of the ANCSA settlement was to preserve the way of rural Alaska village life wherein Alaska natives and non-natives live together, rather than in segregated fashion of the traditional "Lower 48" Indian Reservations. At stated by Mr. Fitzgerald at the Senate Interior Hearings:

> We also believe that one of the great problems in Alaska is that it is on the very threshold of its development, and it would be unwise in Alaska to create today nearly 200 reservations, one for each of the small villages in the State. Alaska today is an open society, its communities are open, while we talk about open villages, these are not closed villages. White people, other people live there too. And it would be very desirable in the long-range political future of Alaska to keep it this way. And it is this kind of concept we have tried to bring to our proposals. Id., p. 126.

It was this "open society" philosophy which was the basis for allowing "squatters" to receive reconveyances.

Given the language of the 1884 Organic Act and Senate Bill 1830, the source of the "occupancy" provision in ANCSA is unmistakable.

The conclusion that Congress did not intend to exclude "squatters" from ANCSA 14(c) reconveyance rights is further supported by the fact that in 1971, when Congress passed ANCSA, there was no statute penalizing erection of cabins on public lands. Even at the present time no penalty

exists under either the Federal Public Land Policy and Management Act, 43 U.S.C. 1701, et seq., or 43 C.F.R. 9230 for the unauthorized erection of cabins. Consequently, "squatter" occupancy arguably is not so egregious as to warrant a conclusion that Congress was unlikely to have granted them title rights.

B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE ALASKA SUPREME COURT IN HAKALA v. ATXAM CORP.

The Ninth Circuit's holding below is contrary to the unanimous holding of the Alaska Supreme Court in the case of Hakala v. Atxam Corp., 753 P.2d 1144 (Alaska 1988). In Hakala, Atxam sued two hunting game guides, George Kitchen and S. Hakala, in Alaska State Court for trespass based on the construction of a cabin, and engaging in game guide activities on Atxam ANSCA lands. Rather than remove the case to federal court, Hakala and Kitchen defended the case in the Alaska state courts based on their ANCSA 14(c) claim rights, and prevailed.

The Alaska Supreme Court stated:

> We do not, however, believe that Congress intended under ANCSA to convey lands to native corporations to the exclusion of those who had previously utilized the lands in an established, legal and routine fashion. Otherwise, we can find no reason for Congress to have included the reconveyance clause in § 14(c)(1). Thus, we believe that in § 14(c)(1), Congress intended to protect the existing rights of those using lands which would later become subject to an interim conveyance under ANCSA. Accordingly, we adopt an interpretation of the phrase "a primary place of business" which effectuates Congress' intent to protect a wide array of existing legitimate businesses. Id., 1147.

It went on to note:

> In interpreting the phrase "a primary place of business," we are particularly mindful of the statutory context in which that phrase appears. Most of the lands subject to conveyance under ANCSA are remote lands, outside the confines of cities, towns and villages. In drafting Section 14(c)(1), Congress must have had in mind those particular lands, and the nature of the particular businesses that are ordinarily conducted on those lands. Much of that business is seasonal, and involves the use of structures that can hardly be considered permanent.... Id., 1148.

Consequently, the Alaska Supreme Court found that Kitchen had a 14(c) claim to that portion of Atxam's ANCSA lands where Kitchen

had erected a small garage type structure made of plastic and metal for his bear hunting operations in the area, even though (1) the structure had only been used during part of a two week period in May and two weeks in October each year, (2) the structure had only been used for 2 out of 20 hunts in 1971, (3) Kitchen usually guided elsewhere out of Teller, Kotzebue and in the Wrangell and Talkeetna mountains, and (4) no pre-1971 federal permit or other vested right was stated to have been held by Kitchen or Hakala.

Since ANCSA 14(c) will only arise either in federal courts within the Ninth Circuit or in the Alaska state courts, this Court should resolve the existing conflict.

C. THE NINTH CIRCUIT'S DECISION RENDERS ANCSA 14(c) MEANINGLESS.

By holding that the Section 14(c)(1) of ANCSA does not apply to technical trespassers on federal lands, the court has rendered

14(c)(1) meaningless. Under the Ninth Circuit's construction 14(c)(1) would be redundant to Sections 11(a), 14(g), and 22(b) of ANCSA. [43 U.S.C. § 1610(a), 1613(g), and 1621(b)]. The latter sections protect non-trespassers who had formal vested land rights granted by the United States before ANCSA's enactment.

D. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE DEPARTMENT OF INTERIOR IN APPEAL OF THEODORE J. ALMASY.

The Department of Interior's Alaska Native Claims Appeal Board ("ANCAB") held in Appeal of Theodore J. Almasy, 87 I.D. 81, 85 (February 27, 1980) that ANCSA 14(c)

> ... protects certain land uses based on occupancy alone, without requiring a claim of title or of a lesser interest derived from contract entry under the public land laws or other authorization.

It is well established that "... great deference should be given to the interpretation that the Secretary of the Interior

places on the statutes which he administers." Alaska Miners v. Andrus, 662 F.2d 577, 579 (9th Cir. 1981). Similar deference should be accorded the Almasy decision because ANCAB was chartered under the jurisdiction of the Secretary of Interior.

E. ANCSA 14(c) RIGHTS ARE NOT IMPAIRED BY WITHDRAWAL FOR PURPOSES OTHER THAN NATIONAL PARKS OR MILITARY DEFENSE.

The Ninth Circuit erred when it stated "... there was no indication of legislative intent to override the established principal that individuals could obtain no rights to withdrawn lands." [See, pps. 15(a) - 16(a) of Petitioners' Joint Appendix]

At the time of ANCSA's enactment most federal lands in Alaska were in a withdrawn status due to Secretary Udall's Public Land Law Order 4582 (the so-called "Alaska Land Freeze"). [See, also, 43 U.S.C. 1616(d)(2) (1971)] ANCSA also withdrew from appropriation or entry under the public land laws,

the entire area proposed for native land conveyances. 43 U.S.C. 1610 (1971) Consequently, the lands conveyed under ANCSA were all withdrawn lands. Congress clearly stated in 43 U.S.C. 1610 that the only public lands not subject to conveyance under ANCSA were the National Park System lands and military withdrawals.

Because Congress permitted the conveyance to ANCSA corporations of all withdrawn lands, with the above two exceptions, the conclusion that ANCSA prohibits the reconveyance of the same lands to occupants is illogical, particularly since the reconveyances are from ANCSA corporations not directly from the United States. Further support for this contention is found in the ANCSA definition of "Public Lands" under 43 U.S.C. § 1602(e) which provides:

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary,

> enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;...

F. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY IN ANCSA 14(c) ACTIONS BETWEEN OCCUPANTS AND NATIVE CORPORATIONS.

The Ninth Circuit erroneously held that 14(c)(1) claims cannot be resolved in any action to which the United States is not a party apparently on the belief that the government must play some role in the adjudication process. A similar argument, i.e. that the Secretary of Interior must take an an active role in adjudicating validity of the rights to which ANCSA conveyance lands are subject, was rejected in the case of Alaska Miners v. Andrus, 662 F.2d at 580.

The U.S. is not required to decide 14(c) issues. ANCSA only requires that the

Secretary make a survey, nothing else. 43 U.S.C. 1612. The Secretary need not decide anything regarding the validity of ANCSA 14(c) claims. That dispute is between the Native corporations and ANCSA 14(c) claimants. [See attached BLM Notice so proclaiming, Exhibit "B"] Congress merely left such issues open for either agreement by the parties or, in the absence of such agreement, for decision by the court. Reconveyance to a specified group of occupants is a ministerial function, not a discretionary one. The types of occupany which qualify are clearly specified in the statute, "... a primary place of business, a primary place of residence, subsistence camp site or reindeer husbandry." 43 U.S.C. 1613(a)(1)

G. THE QUIET TITLE ACT STATUTE OF LIMITATIONS IS NOT APPLICABLE.

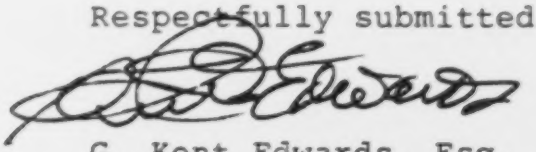
Under the Ninth Circuit's reasoning, all ANCSA 14(c) claims would have been time

barred by the twelve year statute of limitation contained in the Quiet Title Act, 28 U.S.C. 2409a(g). Interestingly, The Quiet Title Act was not even law when ANCSA was enacted. Moreover, Congress has clearly specified that ANCSA 14(c) claims are to be governed by 43 U.S.C. 1632(b) which provides for a statute of limitations of "... one year after the date of filing of the map of boundaries as provided for in regulations promulgated by the Secretary." Such map of boundaries have not been filed yet for most ANCSA settlement land areas. By starting with the premise that 43 U.S.C. 1632(b) controls, one is led to the conclusion that 28 U.S.C. 2409a(g) does not apply and, therefore, the U.S. Government was not considered by Congress to be an indispensable party.

CONCLUSION

The Petition For Writ Of Certiorari should be granted and the Ninth Circuit's decision summarily reversed. To do otherwise would be to subject most occupants of rural native village lands to the ejectment whims of the Native corporations in title; thereby defeating one of the principal land claim settlement goals of Congress - the preservation of an open village society as it existed in 1971.

Respectfully submitted,



G. Kent Edwards, Esq.
HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

BLM

PUBLIC NOTICE TO VILLAGE RESIDENTS

Each village corporation listed below has now officially filed with the Bureau of Land Management (BLM) a map of the village boundaries. This map shows all *or part of* the parcels of land the village corporation has identified as qualifying for transfer of ownership, such as houses, businesses, etc., under Section 14(c) of the Alaska Native Claims Settlement Act (ANCSA). 43 USC 1613(c). This section of the Act requires the village corporation to identify and convey to any Native or non-Native occupant, title to the surface estate in the tract occupied in 1971 as a primary place of residence, primary place of business, subsistence campsite, headquarters for reindeer husbandry, or for certain other specified purposes.

If you have an interest in such land, you should contact the village corporation to review the map of boundaries to be sure the map includes your claim.

VILLAGE: CORPORATION

Nelson Lagoon: Nelson Lagoon Corporation

The official filing date of the map of boundaries is:

June 18, 1987

Federal regulations state that any conflicts among potential transferees or between the village corporation and such transferees are to be resolved before the map is submitted to BLM. 43 CFR 2650.5-4 (c) (1).

The Bureau of Land Management does not have any authority to adjudicate transfer decisions. Any disputes over 14(c) transfers must be resolved between the village corporation and the individual.

If you disagree with the village corporation's boundary decisions, you should contact the corporation. If the disagreement is not resolved, you must start a court action *within one year of the date shown above.* If you have a dispute and do not start a court action within one year, you will forfeit your claim. Alaska National Interest Lands Conservation Act (ANILCA), Sec. 902(b).

Thursday, June 18, 1987, The Anchorage Times

Exhibit "B"

(5) (4)

Nos. 88-533 and 88-549

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, PETITIONER

v.

EKLUTNA, INC., ET AL.

JAMES W. LEE, PETITIONER

v.

EKLUTNA, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
EDWARD J. SHAWAKER
VICKI L. PLAUT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

28 pp

QUESTIONS PRESENTED

1. Whether petitioner Donnelly's suit against the United States claiming title to land under the homestead laws is barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g) (Supp. IV).

2. Whether the United States is an indispensable party to petitioner Donnelly's quiet title suit against the respondent Alaska Native corporations that hold the disputed land under patents issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*

3. Whether a person who is a trespasser on federal land that previously was withdrawn for a special federal purpose and then was patented to a Native corporation under ANCSA can obtain title to the surface estate under Section 14(c) of ANCSA.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Amoco Production Co. v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987) 5
Buettner v. *Kavilco, Inc.*, No. 87-4435 (Oct. 26, 1988) ... 20
Davis v. *Nelson*, 329 F.2d 840 (9th Cir. 1964) 14
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) .. 14
Guam v. *United States*, 744 F.2d 699 (9th Cir. 1984) 14
Hakala v. *Axtam Corp.*, 753 P.2d 1144 (Alaska 1988) ... 20, 23
Kuehner v. *Heckler*, 778 F.2d 152 (3d Cir. 1985) 14
Lee v. *Eklutna, Inc.*, No. 87-642 (Jan. 27, 1988) 9, 11
Lee v. *United States*, 629 F.Supp. 721 (D. Alaska 1985), aff'd, 809 F.2d 1406 (9th Cir. 1987), cert. denied, No. 87-642 (Jan. 27, 1988) 2, 3, 4, 8, 9, 10, 16
Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 18

Statutes, regulations and rules:

Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* 2
§ 3(e), 43 U.S.C. 1602(e) 5
§ 4, 43 U.S.C. 1603 5
§§ 11-15, 43 U.S.C. 1610-1614 5
§ 14(c)(1), 43 U.S.C. 1613(c)(1) 8, 9, 11, 18, 19, 20, 21, 22, 23
§ 12(a)(1), 43 U.S.C. 1611(a)(1) 5
§ 14, 43 U.S.C. 1613 6
§ 14, 43 U.S.C. 1613(a) 5

Statutes – Continued: Page

§ 22(b), 43 U.S.C. 1621(b) 6, 7
§ 902(a), 43 U.S.C. 1632(a) 15
Federal Power Act, 16 U.S.C. 818 2
Quiet Title Act, 28 U.S.C. 2409 *et seq.*:
28 U.S.C. 2409a 6
28 U.S.C. 2409a(g) (Supp. IV) 7, 11
42 U.S.C. 7151(b) 2
42 U.S.C. 7171(a) 2
42 U.S.C. 7172(a) 2
42 U.S.C. 7291 2
42 U.S.C. 7293 2
43 U.S.C. 31 2
44 U.S.C. 1507 14
Fed. R. Civ. P.:
Rule 19 16
Rule 19(a) 16
Rule 19(b) 16, 17
43 C.F.R. 221.1 *et seq.* (1958) 13

Miscellaneous:

21 Fed. Reg. 1860 (1956) 14
26 Fed. Reg. 2486 (1961) 4

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-533

THERESE U. DONNELLY, PETITIONER

v.

EKLUTNA, INC., ET AL.

No. 88-549

JAMES W. LEE, PETITIONER

v.

EKLUTNA, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-17a) is reported at 850 F.2d 1313. The opinions and findings of the district court (Pet. App. 18a-86a) are unreported.

JURISDICTION

The decision of the court of appeals was rendered on March 10, 1988, and a timely petition for rehearing was denied on June 27, 1988 (Pet. App. 4a, 94a-97a). The peti-

tion for a writ of certiorari was filed on September 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases concern the ownership of several parcels of land in the Eagle River Valley near Anchorage, Alaska. The parcels in question are part of a tract that was patented by the United States in 1979 to respondent Eklutna, a Native corporation that was established under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* Prior to 1979, however, the land was included in Power Site Classifications 107 and 399, which were issued in 1925 and 1950, respectively, pursuant to 43 U.S.C. 31 and Section 24 of the Federal Power Act, 16 U.S.C. 818. Pet. App. 18a-19a. The background of these two cases is essentially identical to that of *Lee* v. *United States*, 629 F. Supp. 721 (D. Alaska 1985), aff'd, 809 F.2d 1406 (9th Cir. 1987), cert. denied, No. 87-642 (Jan. 27, 1988) [hereinafter *Lee I*], and No. 88-549 involves the same petitioner and the same parcel of land as *Lee I*.

1. Section 24 of the Federal Power Act provides that land included in a proposed power project site shall be "reserved from entry, location, and other disposal under the laws of the United States * * *." The issuance of Classifications 107 and 399 therefore had the effect of withdrawing the parcels at issue in this case from entry under the public land laws. Section 24 of the Federal Power Act further provides that if the Federal Power Commission (FPC)[1] determines that any of the land set

[1] The FPC has been abolished and its duties transferred to the Secretary of Energy and the Federal Energy Regulatory Commission. See 42 U.S.C. 7151(b), 7171(a), 7172(a), 7291 and 7293.

aside for a power site will not be injured or destroyed for purposes of power development if it is made available for location, entry, or selection under the public land laws, the Secretary of the Interior, after giving 90 days' notice to the Governor of the State, shall declare the land open to entry under those laws. In 1952, the FPC determined that certain of the land covered by Power Site Classifications 107 and 399 would not be injured for purposes of power development by location or entry under the public land laws. However, the Secretary of the Interior did not thereafter revoke the withdrawal and declare the land open for entry or settlement. Pet. App. 5a.[2]

In 1957, petitioner Donnelly[3] and petitioner Lee moved onto separate tracts of land in the Eagle River Valley, with the expectation of homesteading those tracts. Some of the land on which each petitioner settled was open for homesteading. However, in 1957 and 1958, the Bureau of Land Management (BLM) informed petitioners that other portions of the proposed homestead sites—the portions at issue here—were within the power site classifications and for that reason would not be available until BLM formally opened them for entry. Although petitioners were invited to appeal, they did not do so. Pet. App. 34a, 63a-65a; *Lee I*, 809 F.2d at 1407.

Petitioners Donnelly and Lee did, however, file renewed homestead applications for the same parcels. At the same time, petitioners resorted to political channels, joining with other would-be homesteaders in the area in writing to members of the Alaska congressional delegation and to

---

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 88-533.

[3] Upon his death, Joseph F. Donnelly, the original party in interest, was succeeded by his wife, Therese U. Donnelly. For ease of reference, however, we refer to Joseph Donnelly as "petitioner."

the Secretary of the Interior. Responding to these inquiries, both the Director of BLM and the Assistant Secretary of the Interior reiterated that petitioners had no rights in land within the power-site withdrawal. The Director of BLM explained to Delegate (later Senator) Bartlett that "[i]n the absence of special legislation, we know of no way of assuring the Lees and the Donnellys of continued occupancy of the lands for homestead purposes. Any settlement on power-site lands which have not been opened to entry is a trespass against the United States and no rights can be gained thereby" (Pet. App. 67a-68a). The Assistant Secretary also informed a representative of homestead applicants in the area that portions of their proposed homestead sites were not open to entry; that further action by the Department of the Interior with respect to the land would have to await completion of an engineering survey; and that even if the power-site withdrawal were revoked, the State of Alaska and veterans would have preference rights (*id.* at 36a, 69a-70a, 113a-114a; *Lee I,* 809 F.2d at 1407). In 1959, BLM informed petitioner Donnelly that his second homestead application was invalid and that "any use or occupancy of these lands will constitute a trespass against the United States" (Pet. App. 70a-71a; see also *id.* at 35a). Donnelly once again did not take an appeal pursuant to administrative procedures (*id.* at 71a-72a). Petitioner Lee's application was similarly rejected in 1961 (*id.* at 36a).

In 1961, after publishing notice in the Federal Register, BLM filed a platted survey of the area that delineated, inter alia, the boundaries of Classifications 107 and 399 in relation to the potential homestead sites selected by petitioners. 26 Fed. Reg. 2486. Soon thereafter, BLM notified petitioner Donnelly that upon finalization of the survey, it would permit him to file a renewed homestead application for the land outside the power-site withdrawal (Pet. App.

72a-74a). BLM made clear, however, that "[t]his notice is not to be construed as granting any rights or concessions to the withdrawn lands" (*id.* at 73a). In 1964, both petitioners entered into compromise arrangements with BLM that enabled them to submit proof of occupancy for those portions of the proposed homestead entries that were located outside the withdrawal area and to receive patents from the United States for those portions (*id.* at 13a-14a, 37a). Under this arrangement, petitioner Donnelly received a patent to 67.5 acres of the land in his original 160-acre homestead claim and petitioner Lee received a patent to 95 acres of his original 160-acre claim (*id.* at 6a, 38a). The instant petitions concern only the portions of the 160-acre sites selected by Donnelly and Lee that were within the power-site withdrawal area.

2. On December 18, 1971, Congress enacted ANCSA, which was intended to settle the aboriginal land claims of Native Alaskans. Under Section 4 of the ANCSA, 43 U.S.C. 1603, all claims of aboriginal title in Alaska were extinguished. See *Amoco Production Co.* v. *Village of Gambell*, No 85-1239 (Mar. 24, 1987), slip op. 3-4. At the same time, Congress provided for regional and village Native corporations organized under ANCSA to select and receive title to public land in Alaska, including land within certain power-site withdrawals. See 43 U.S.C. 1602(e), 1610-1614.[4] In addition, Section 22(b) of ANCSA

[4] ANCSA permits each Native village corporation to select a minimum of 69,120 acres of public land from lands withdrawn under the Act. 43 U.S.C. 1611(a)(1), 1613(a). ANCSA defines "public land" as "all Federal lands and interests therein located in Alaska," except the smallest practicable tract surrounding any federal facility and land selected by the State of Alaska under its Statehood Act. 43 U.S.C. 1602(e). Power-site withdrawals are "public land" under this definition, and they therefore may be selected by a Native corporation under ANCSA.

directed the Secretary of the Interior to issue patents to all persons who had made lawful entry in compliance with the public land laws for the purpose of gaining title to homesteads, headquarter sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 1621(b)). These patents were to issue promptly after ANCSA was passed, so that the Native corporations could select lands with the assurance that they would not be patented to others.

Pursuant to Section 14 of ANCSA, 43 U.S.C. 1613, the Native village corporation of Eklutna filed a land selection that included the parcels at issue here. In 1979, the United States issued Eklutna a patent to the surface estate in the land and issued respondent Cook Inlet Region, Inc., the regional Native corporation for the area, a corresponding patent to the subsurface estate. *Lee I,* 809 F.2d at 1408.

3. a. In 1975, the United States filed a trespass action against petitioner Donnelly with respect to the 92.5 acres he claimed within the power-site withdrawal. Later that year, Donnelly filed a counterclaim against the United States under the Quiet Title Act (QTA), 28 U.S.C. 2409a, seeking to quiet title to the disputed land in himself. In 1979, after the United States patented the land to Eklutna under ANCSA, petitioner also filed a counterclaim against Eklutna (which had intervened to protect its interest in the disputed land), as well as a second amended counterclaim against the United States. In its final form, petitioner Donnelly's counterclaim against the United States sought to (i) quiet title in petitioner to the portion of the Native corporation's land for which petitioner had sought to make a homestead entry some years earlier; (ii) force the Department of the Interior to invalidate Eklutna's patent for the same land, accept petitioner's homestead application, and patent the land to Donnelly instead; and (iii) enjoin the government from disturbing his use and occupancy of the land. Petitioner Lee also filed a direct action

against the United States and Eklutna raising similar claims.

b. On January 25, 1980, after the United States patented the disputed land to Eklutna, the district court granted the government's motion to dismiss its trespass claim against Donnelly. Pet. App. 6a. Following a bench trial, the court also dismissed Donnelly's counterclaims against the United States and Eklutna (*id.* at 6a-7a). The district court held that it lacked jurisdiction over Donnelly's claim against the United States because it was barred by the 12-year statute of limitations under the QTA, now codified at 28 U.S.C. 2409a(g) (Supp. IV) (Pet. App. 23a). The district court reaffirmed that ruling in its December 5, 1986 opinion (*id.* at 50a-57a), finding that petitioner "knew or should have known of the claim of the United States" at least by 1958, when BLM rejected his original homestead entry, or, at the latest, by 1961, when BLM completed its survey covering the contested land and published notice of the survey in the Federal Register (*id.* at 52a).

The district court also rejected petitioner Donnelly's claims against respondent Eklutna (Pet. App. 31a, 32a-49a, 50a-57a). The court first dismissed petitioner's challenge to Eklutna's patent because petitioner was jurisdictionally barred by the QTA's statute of limitations from establishing that his title was valid as against the United States (*id.* at 31a, 51a n.1). The court later reaffirmed that dismissal, and further held that the federal common-law basis for petitioner's claim against respondent Eklutna had been preempted by ANCSA, and that petitioner could not assert a claim against Eklutna under Section 22(b) of ANCSA because that provision imposes duties only on the Secretary of the Interior, not on Native corporations (Pet. App. 52a-53a).[5] In a decision rendered

[5] The court noted in passing that even if petitioner Donnelly had filed a Section 22(b) claim against the Secretary, his claim would have

on January 23, 1985, the district court rejected similar claims by petitioner Lee against the United States and Eklutna. *Lee I*, 629 F. Supp. 721.

c. Finally, in a decision rendered on November 13, 1986, the district court rejected the remaining contention advanced by both Lee and Donnelly—namely, that they were entitled to receive title to the surface estate in the disputed parcels under Section 14(c)(1) of ANCSA. That Section provides that upon receipt of the patent, a village corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in a tract that was occupied as of December 18, 1971, "as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry" (43 U.S.C. 1613(c)(1)). The district court held that "mere physical presence" is not sufficient to constitute "occupancy" for purposes of Section 14(c)(1) and that Congress did not intend Section 14(c)(1) to apply to "mere[] trespassers, failed homesteaders, or land users without any vested rights prior to 1971" (Pet. App. 43a, 49a).

4. Petitioner Lee's claims against the United States and Eklutna—except for his claim against Eklutna seeking title to the surface estate under Section 14(c)(1) of ANCSA—were the subject of a separate appeal, which was decided by the court of appeals on April 17, 1987. *Lee I*, 809 F.2d 1406. In that decision, the court of appeals agreed with the district court that petitioner Lee's suit against the United States was barred by the 12-year statute of limitations in the QTA, because he knew or should have known of the United States' claim by 1961, when the notice

---

been barred by the QTA's 12-year statute of limitations (Pet. App. 53a n. 2).

of survey was published in the Federal Register (809 F.2d at 1410). The court of appeals also affirmed the district court's dismissal of Lee's action against Eklutna to quiet title to the 65 acres Lee claimed within the power-site withdrawal, on the ground that the United States was an indispensable party that could not be joined because of the bar created by the QTA's 12-year statute of limitations (*id.* at 1410-1411). This Court denied Lee's petition for a writ of certiorari seeking review of these rulings by the court of appeals in *Lee I (Lee* v. *Eklutna, Inc.,* No. 87-642 (Jan. 27, 1988)), and Lee (unlike Donnelly) no longer challenges those rulings.

5. The decision of the court of appeals at issue here was rendered almost a year later, on March 10, 1988 (Pet. App. 1a-17a). In that decision, the court first affirmed the district court's dismissal of petitioner Donnelly's quiet title claims against the United States and Eklutna, which were essentially identical to those rejected in *Lee I.* Adopting its reasoning in *Lee I,* the court held that Donnelly's action against the United States is barred by the 12-year statute of limitations under the QTA, since he knew or should have known of the United States' adverse claim when the notice of survey was published in the Federal Register in 1961 (*id.* at 11a-14a), and that Donnelly's title action againt Eklutna cannot proceed because the United States is an indispensable party that cannot be joined because of the QTA's 12-year statute of limitations (*id.* at 14a-15a).

The court of appeals also affirmed the district court's dismissal of the claims against Eklutna by both petitioner Donnelly and petitioner Lee seeking title to the surface estate of their respective parcels under Section 14(c)(1) of ANCSA (Pet. App. 15a-17a). The court held that Section 14(c)(1), which requires Native corporations to convey surface rights to certain "occupants" of land patented to

the corporations, does not operate as an "amnesty provision" for individuals who are trespassers or failed homesteaders (Pet. App. 15a). The court explained that it found "no indication of congressional intent to override the established principle that individuals could obtain no rights to withdrawn lands," and that "the congressional intent to provide a 'just and fair settlement' of native land claims is inconsistent with an interpretation of § 14(c)(1) that would reduce the land patented to native corporations in favor of trespassers" (*id.* at 15a-16a (citation and footnotes omitted)). The court of appeals acknowledged petitioners' contention that they were not trespassers because the Secretary was required to revoke the power-site withdrawal in the 1950s and issue homestead patents to them, and that they therefore had equitable title to the disputed parcels. But the court held that, under its decision in *Lee I*, the United States is an indispensable party to an action seeking to establish petitioners' equitable title and that the United States cannot be joined because of the 12-year statute of limitations under the QTA (*id.* at 16a).[6]

ARGUMENT

The court of appeals correctly held that petitioner Donnelly's quiet-title action against the United States is barred by the 12-year statute of limitations under the Quiet Title Act and that his quiet title action against respondent Eklutna is barred because the United States is an indispensable party to such a suit and cannot be joined. The court of appeals' rulings on these issues do not conflict with any

[6] The court of appeals also rejected petitioner Donnelly's "constructive trust" claim against respondent Eklutna. Relying on the district court's decision in *Lee I* (629 F. Supp. at 728-729), the court held that ANCSA "occupies the field" in this area and preempts federal common-law claims (Pet. App. 16a).

decision of this Court or of another court of appeals, and they present no question of general importance warranting review by this Court. In fact, the Court last Term denied petitioner Lee's petition for a writ of certiorari challenging the court of appeals' identical rulings in *Lee I* (*Lee* v. *Eklutna, Inc.*, No. 87-642 (Jan. 27, 1988)), and there is no reason for a different disposition here. The attempt by both petitioners to avoid the result in *Lee I* by seeking title to the surface estate of the disputed parcels under Section 14(c)(1) of ANCSA likewise does not warrant review. The court of appeals' decision denying relief under Section 14(c)(1) in the circumstances of this case does not conflict with any decision of this Court or of another court of appeals and does not involve considerations of general importance under ANCSA. The petitions for a writ of certiorari therefore should be denied.

1. Petitioner Donnelly contends (88-533 Pet. 9-18, 23-25) that he has equitable title to the 97.5-acre portion of his original homestead claim that was within the powersite withdrawal, because the Secretary of the Interior should have revoked the withdrawal in the 1950s and issued him a homestead patent to the disputed parcel. The court of appeals properly denied Donnelly relief on that claim, both against the United States and against respondent Eklutna.

a. The court of appeals correctly held that Donnelly's claim against the United States is barred by the 12-year statute of limitations in the Quiet Title Act (Pet. App. 11a-14a). Under 28 U.S.C. 2409a(g) (Supp. IV), any QTA action is barred "unless it is commenced within twelve years of the date upon which it accrued," and an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." Both courts below

found that Donnelly knew or should have known of the United States' adverse claim to the land in 1958, when BLM denied his first homestead application (Pet. App. 65a-68a); in 1959, when BLM rejected his second homestead application and notified him that continued occupancy would be a trespass against the United States (*id.* at 70a-71a); or, at the latest, in 1961, when BLM published and recorded its survey describing the disputed area as withdrawn (*id.* at 72a). See *id.* at 13a, 23a, 52a. Each of those dates was more than 12 years prior to 1975, when Donnelly first sought to have the court quiet title in him, as against the United States. Donnelly's QTA claim against the United States therefore is time-barred.

Furthermore, petitioner Donnelly's attempt to obtain relief against the United States under the QTA is essentially identical to that made by petitioner Lee but rejected by both courts below in *Lee I*. In the late 1950s, both Lee and Donnelly sought to obtain homestead patents to 160-acre parcels that included some land that was not subject to entry under the homestead laws because it had been withdrawn as a potential power site. BLM therefore denied the homestead applications of both petitioners for the full 160 acres, although both petitioners ultimately were issued homestead patents to the portions of their respective parcels that fell outside the power-site withdrawal. Despite BLM's unequivocal rejection of their applications for a patent to the land within the power-site withdrawal and the publication in the Federal Register of a survey specifically marking the scope of the United States' claim, both petitioners failed to take timely action to preserve any claims they may have had to the portions within the power-site withdrawal. This Court declined to review the holding by both courts below that Lee's quiet title claim against the United States therefore was time-

barred, and the identical fact-bound claim is no more worthy of review here.

Contrary to Donnelly's submission (88-533 Pet. 23-24), the communications with government officials after 1959 concerning his homestead entry did not constitute an administrative appeal of the Department's rejection of his application for land within the power-site withdrawal. Petitioner in fact took no appeal of BLM's rejection of his 1959 application. Indeed, in the district court, petitioner acknowledged that he knew of the government's adverse claim based on the power-site withdrawal and that he deliberately decided not to appeal: he stated that he took no appeal because he "could not be expected to repeatedly appeal a matter on which the Secretary of the Interior had spoken so conclusively in 1959" (Clerk's R. 251, at 7).

During and after 1959, Donnelly sought to obtain a different result through political, not legal channels, by writing letters to his congressional representatives and the Secretary. In every communication to or about petitioner Donnelly in response to these inquiries, the Department of the Interior reiterated that the land within the power-site withdrawal was not available for homestead entry and that continued occupancy of that land constituted a trespass against the United States. See pages 3-4, *supra*. The Department did undertake to ascertain how much of the 160-acre area sought by Donnelly fell outside the withdrawn area, so that this land—which was open to homestead entry—could be patented to him. But it was clear at all times that this undertaking by the Department did not constitute an appeal by Donnelly of the Department's rejection of his application for lands inside the withdrawn area. See 43 C.F.R. 221.1 *et seq.* (1958); *Department of the Interior Circular 1950,* 21 Fed. Reg.

1860 (Mar. 27, 1956); *Davis* v. *Nelson*, 329 F.2d 840, 847 (9th Cir. 1964).[7]

Petitioner Donnelly's related argument (88-533 Pet. 23-24) that he was entitled to individualized notice and that he therefore was not sufficiently put on notice by the March 15, 1961, publication in the Federal Register of the government's claim to the withdrawn area is also without merit. The primary purpose of the Federal Register is to furnish notice to the world of its contents, and the world is therefore charged with such notice. See 44 U.S.C. 1507; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947); *Kuehner* v. *Heckler*, 778 F.2d 152, 161 (3d Cir. 1985). See also *Government of Guam* v. *United States*, 744 F.2d 699, 701 (9th Cir. 1984) (publication of United States' claim in Federal Register triggered running of QTA's limitations period). Petitioner had no pending appeal at the time of the publication in the Federal Register; but even if he did, one who is involved in ongoing dealings with an agency surely should not be held to a lesser standard of notice than the world at large. Any other rule would completely undermine the Federal Register's function of furnishing official notice to citizens at large of the

---

[7] Donnelly erroneously relies (88-533 Pet. 23-24) on a departmental notice to him dated May 12, 1961. That notice stated that Donnelly was not then required to reduce his application to cover only land outside the power-site withdrawal, because a survey was contemplated; but the notice expressly stated that it was "not to be construed as granting any rights or concessions to the withdrawn area" and that at the completion of the investigation, a new decision with an appropriate appeal period would be issued "calling for an application to enter on the lands not withdrawn" (Pet. App. 87a-88a). This notice, which was sent to Donnelly more than 12 years before he filed his QTA claim, thus made clear that the Department continued to reject any claim to lands that *were* withdraw ..

government's actions and decisions. Moreover even if Donnelly's argument regarding the Federal Register notice were sound, the judgment of the court of appeals would still be correct: as that court further held (Pet. App. 13a-14a), Donnelly already had personal notice sufficient to trigger the QTA's limitations period as of 1959, when BLM notified him for the second time that his homestead entry had been rejected.[8]

b. Petitioner Donnelly further contends (88-533 Pet. 9-11, 14-18) that even if his QTA claim against the United States was properly dismissed, his suit against respondent Eklutna should have been permitted to continue. In particular, Donnelly argues (*id.* at 9-11) that the court of appeals erroneously held that his quiet title suit against Eklutna is subject to and barred by the 12-year statute of limitations in the QTA. Donnelly mischaracterizes the basis of the decision below. The court of appeals did not hold that the 12-year statute of limitations that governs QTA suits against the United States is directly applicable to Donnelly's quiet title suit against Eklutna. Rather, relying on its prior decision in *Lee I,* the court simply held that the United States is an indispensable party to Donnelly's

---

[8] Donnelly also contends (88-533 Pet. 12-13) that his claim seeking a patent from the United States should be governed by the statute of limitations in ANCSA (43 U.S.C. 1632(a)), which provides that a decision of the Secretary under ANCSA shall not be subject to judicial review unless such review is initiated within two years. In Donnelly's view, his claim is timely under Section 1632(a) because it was filed before the expiration of two years after the Secretary issued the patent to respondent Eklutna in 1979. However, as we explained in response to petitioner Lee's identical argument in *Lee I* (87-642 Br. in Opp. 9 n.5), Section 1632(a) was intended to *limit* claims; it was not intended to *revive* claims against the United States that were already barred by another statute (*e.g.*, the QTA) at the time the Secretary rendered the relevant decision under ANCSA.

quiet title suit against Eklutna but that the United States cannot be joined as a defendant because the QTA's statute of limitations bars Donnelly's claim against the United States (Pet. App. 14a-15a, quoting 809 F.2d at 1410-1411).

Donnelly does not even mention, much less rebut, the indispensable-party basis for the court of appeals' decision dismissing his quiet title claim against Eklutna. There accordingly is no reason for the Court to grant review of the court of appeals' judgment in that respect, especially since the Court has already denied review of that issue in *Lee I*. Moreover, as we explained in our brief in opposition in *Lee I* (87-642 Br. in Opp. 12-16), the indispensable-party holding in *Lee I* (and therefore in this case) is correct under Fed. R. Civ. P. 19. The United States plainly has an "interest" (within the meaning of Rule 19(a)) in Donnelly's suit against Eklutna, because if he were to succeed in this case and thereby deprive Eklutna of its title to the 97.5 acres, Eklutna would be entitled to receive other land from the United States to compensate for that diminution of its statutory entitlement. See 87-642 Br. in Opp. 13-14 & n.1. Because the United States therefore is a necessary party, but cannot be joined as a defendant in Donnelly's suit to establish his title because of the QTA's statute of limitations, it is necessary to determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable" (Fed. R. Civ. P. 19(b)).

A weighing of the four factors that are among those to be considered in making a determination under Rule 19(b) establishes that the dismissal in this case was proper. The potential prejudice to the United States is clear, because if Donnelly were to prevail in his suit against Eklutna, the United States would stand to lose its title to an equivalent amount of land. Nor can relief be shaped in a way that

would lessen the harm to the United States. The remaining two factors identified in Rule 19(b) might be thought to weigh in favor of allowing the suit to proceed, since the court presumably could enter an adequate judgment in the absence of the United States and Donnelly does not have an adequate remedy at the present time if his suit against Eklutna is dismissed. However, the latter factor is scarcely compelling, because Donnelly plainly did have an adequate remedy in the form of a suit against the United States under the QTA, but he voluntarily allowed the time for filing such a suit to expire. Moreover, Rule 19(b) in the end requires a court to rely on "equity and good conscience" in determining whether a suit should be dismissed because of the absence of a necessary party. Here, because petitioner's problems are of his own making, and because any judgment entered in favor of Donnelly against Eklutna would ultimately redound to the detriment of the United States, the court of appeals' conclusion that the United States is an indispensable party in the circumstances of this case is amply supported by "equity and good conscience." In any event, the question whether the United States is an indispensable party under the particular statutory and regulatory framework implementing the selection rights of Alaska Native corporations is not one of general importance that warrants review by this Court.[9]

---

[9] Donnelly relies (88-533 Pet. 14-18) on a common-law theory of constructive trust in seeking to wrest title to the 97.5 acres from respondent Eklutna. However, as we explained in *Lee I* in response to petitioner Lee's reliance on the same constructive-trust theory and cases (see 87-642 Br. in Opp. 12), this argument ignores the particular factual circumstances and statutory framework of this case. Even if a federal common-law constructive-trust action against the patentee survived the enactment of ANCSA and the QTA, the United States would be an indispensable party to such an action because the United

2. Petitioner Donnelly and petitioner Lee both contend (88-533 Pet. 18-23; 88-549 Pet. 11-27) that even if they cannot succeed on their claim that they already have equitable title to the disputed parcels (on the theory that the Secretary was required to rescind the power-site withdrawal in the 1950s and immediately issue them homestead patents that included those parcels), respondent Eklutna is required to convey the title to the surface estate in those parcels to them under Section 14(c)(1) of ANCSA.[10] This effort by petitioners to avoid the consequences of their failure to press their homestead claims against the United States in a timely manner does not warrant this Court's attention.

a. Petitioners first appear to suggest (88-533 Pet. 20, 21-22; 88-549 Pet. 7, 20-21, 25) that the court of appeals held (i) that a plaintiff may not bring an action under Section 14(c)(1) of ANCSA to compel a Native village corporation to convey title to the surface estate unless the plaintiff also brings a quiet title action against the United States to establish that he already has title to the land; and (ii) that an action against the village corporation therefore

---

States would be required to convey an additional amount of land to the Native corporation to compensate for any land that the corporation was found to hold in constructive trust for Donnelly. Moreover, both courts below held that under the rationale of *Milwaukee* v. *Illinois*, 451 U.S. 304, 313-319 (1981), a federal common-law constructive-trust action does not survive the enactment of ANCSA, because ANCSA occupies the field of disputed title to lands selected by Native corporations (Pet. App. 16a; *Lee I*, 629 F. Supp. at 728-729).

[10] Section 14(c)(1) provides that a Native village corporation to which a patent has been issued shall first convey to a Native or non-Native occupant the title to the surface estate that was occupied as of December 18, 1971, "as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry" (43 U.S.C. 1613(c)(1)).

will always be barred if an action against the United States with respect to the same land does not lie under the QTA. Petitioners are mistaken if they actually read the court of appeals' opinion in this manner, which would effectively render the United States an indispensable party to every suit under Section 14(c)(1).

We agree with petitioners that suits under Section 14(c)(1) are disputes that arise principally between the Native village corporation and the plaintiff asserting occupancy rights, since the village corporation's duty to convey title to the surface estate arises only after the United States has issued a patent to the corporation. We further agree that the United States is not an indispensable party to an ordinary suit under Section 14(c)(1), since if the plaintiff obtains title to the surface estate he actually occupies, the United States is not obligated to issue a patent to the Native corporation for an additional amount of land. In this respect, suits by third parties to obtain title to the surface estate in the first instance under Section 14(c)(1), based on past occupancy, differ from quiet-title and similar suits by third parties claiming that they *already* have title to the land and that the United States therefore could not convey title to the Native corporation in the first place.

Contrary to petitioners' apparent contention, however, the court of appeals did not hold otherwise in this case. The court did not dismiss petitioners' Section 14(c)(1) claims because of the absence of an indispensable party (the United States) that could not be sued. It instead rejected petitioners' Section 14(c)(1) claims *on the merits*, concluding that that Section does not afford amnesty relief to persons whose homestead claims were barred because the land for which they applied had been withdrawn for a special federal purpose and who therefore were tres-

passers on the unavailable land. Pet. App. 15a-16a. Petitioners sought to answer this reasoning by contending that they were not in fact trespassers because they had equitable title to the land, on the theory (which the court of appeals had already found to be barred) that the Secretary was required to revoke the power-site withdrawal in the 1950s and patent the parcels to petitioners under the homestead laws (*id.* at 16a). It was only in response to that claim by petitioners of preexisting *title*, rather than merely past occupancy, that the court of appeals then discussed petitioners' inability to establish title to the parcels because the QTA's 12-year statute of limitations bars a quiet title action against the United States (*ibid.*). The court did not suggest that the ability to bring a timely quiet-title suit against the United States is a prerequisite to Section 14(c)(1) suits generally. This reading of the opinion below is confirmed by the Ninth Circuit's subsequent decision in *Buettner* v. *Kavilco, Inc.*, No. 87-4435 (Oct. 26, 1988), in which it decided the merits of a claim under Section 14(c)(1) without any suggestion that the absence of the United States as a party presented a jurisdictional or procedural defect. The Supreme Court of Alaska likewise has decided a Section 14(c)(1) claim on the merits without any suggestion that the absence of the United States presented an obstacle to its doing so. *Hakala* v. *Axtam Corp.*, 753 P.2d 1144 (1988). Accordingly, the decision below does not warrant review on any question involving the status of the United States as an indispensable party under Section 14(c)(1).

b. Nor does the court of appeals' rejection of petitioners' Section 14(c)(1) claims on the merits warrant review by this Court. Because suits under Section 14(c)(1) are principally between the plaintiff and the Native village corporation and do not directly involve the United States,

the United States did not take a position in the court of appeals on the merits of petitioners' claims under Section 14(c)(1), and we do not take a definitive position on the scope of that Section here. However, whatever may be the application of Section 14(c)(1) to other persons who might be termed "trespassers" on federal lands, the circumstances of this case do lend particularlized support to the court of appeals' rejection of petitioners' claims and serve to distinguish those claims from others that have arisen or may arise under Section 14(c)(1).

This case involves land that had long been withdrawn from entry under the public land laws at the time it was patented to respondent Eklutna in 1979, and petitioners had been repeatedly informed, beginning more than 20 years earlier, that they had no rights in the land and were trespassers on it. In fact, the United States brought a trespass action against petitioner Donnelly in 1975, four years before the land was patented to Eklutna. As a result, petitioners did not have the sort of expectation of continued possession that Section 14(c)(1) was intended to protect. Indeed, petitioners were specifically informed when their homestead applications were denied in the late 1950s that if the power-site withdrawal were subsequently revoked, as petitioners urged, they would not necessarily receive a homestead patent to the land they sought within the withdrawal area, because other persons—the State of Alaska and veterans—would have preference rights to select the same land. See page 4, *supra*. The effect of the court of appeals' interpretation of Section 14(c)(1) in this case is simply to recognize an additional person (respondent Eklutna) who also was given a preference right to select the land. Accordingly, the Section 14(c)(1) claims in this case are quite different from those that might be advanced in other cases by persons who built a home or

engaged in business on land in the public domain that had not been withdrawn for a special federal purpose.

Moreover, even if the court of appeals erred in concluding that Section 14(c)(1) is wholly inapplicable to land within a power-site withdrawal, it does not follow that Section 14(c)(1) would support a claim to more than the land on which a residence or place of business was actually built, as well as the immediately adjacent area (the curtilage). Compare *Buettner* v. *Kavilco, supra* (involving "lots" on which homes had been built); *Halaka* v. *Axtam Corp., supra* (holding that only the business site and the surrounding curtilage were covered by Section 14(c)(1)). In particular, there is substantial reason to doubt that Section 14(c)(1) was intended to afford a basis for obtaining title to the surface estate in an entire 160-acre homestead claim (or the 97.5-acre and 65-acre portions of such a claim that petitioners seek in this case), which would encompass far more than the residence or business and the curtilage.[11] In fact, petitioner Lee, in response to a notice of trespass served by the government, removed his improvements from the parcel within the withdrawal area in November 1971 (Pet. App. 39a-40a). He therefore did not even have a residence or business on the land he claims to

---

[11] These factors may distinguish the claims of most if not all of the 59 individuals who have filed a brief as amici curiae in this case. That brief does not disclose how many (if any) such claims involve land that was withdrawn for a special federal purpose. Moreover, the motion accompanying the brief states (mot. at 3) that most of the individuals are operators of commercial fishing sites, which presumably would involve claims that are far more modest than those advanced by petitioners here. Indeed, amici concede (mot. at 4) that "[t]he interests of the fifty-nine 14(c) Claimants differ from that of Petitioners, in that *Donnelly Lee* were principally interested in obtaining broader relief in the courts below under the Homestead Act in order to receive title to more acreage than would be the case under ANCSA 14(c)."

have "occupied" on December 18, 1971, the relevant date under Section 14(c)(1) of ANCSA.[12]

In any event, the decision of the Ninth Circuit regarding the application of Section 14(c)(1) in the circumstances of this case does not conflict with the decision of any other court of appeals, since such claims to land in Alaska under ANCSA cannot arise in other federal circuits. Significantly, moreover, the only other case decided by the Ninth Circuit under Section 14(c)(1) involved persons who lawfully occupied the land in question under permits issued by the Forest Service (*Kavilco,* slip op. 13399), and the Ninth Circuit sustained their claims. Nor, contrary to petitioners' contention (88-533 Pet. 9; 88-549 Pet. 21), does the court of appeals' application of Section 14(c)(1) conflict with the decision of the Alaska Supreme Court in *Halaka.* The Alaska Supreme Court there construed the phrase "primary place of business" in Section 14(c)(1); it did not consider whether trespassers generally, or trespassers on withdrawn lands in particular, are eligible to receive title to the land under Section 14(c)(1). To the contrary, the court in *Halaka* described Section 14(c)(1) as affording protection to persons "who had previously utilized the lands in an established, *legal* and routine fashion" (753 P.2d at 1147 (emphasis added)). Finally, as noted above, neither *Kavilco* nor *Halaka* supports petitioners' invocation of Section 14(c)(1) to obtain title to their entire homestead claims, rather than to only the land under and immediately surrounding a residence or business establishment.

For the foregoing reasons, and because petitioners' homestead claims are not typical of those arising under Section 14(c)(1), review by this Court is not warranted.

---

[12] Petitioner Donnelly, on the other hand, defied the notice of trespass and retained a residence within the withdrawn area on December 18, 1971 (Pet. App. 40a).

CONCLUSON

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
EDWARD J. SHAWAKER
VICKI L. PLAUT
Attorneys

JANUARY 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00049

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-533
No. 88-549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR AND DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,

Respondents.

JAMES W. LEE,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

STEVEN P. OLIVER
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI	1

TABLE OF AUTHORITIES

CASES:	Page
Buettner v. Kavilco, (9th Cir. No. 87-4435, October 26, 1988)	3
Daniels v. Wagner, 237 U.S. 547, 567 (1915)	2
Hakala and Kitchen v. Atxam, 753 P.2d 1144 (Alaska 1988)	3
Lee v. United States et al, 809 F.2d 1406 (9th Cir. 1987), *cert. denied, sub nom Lee v. Eklutna, et al*, 56 U.S.L.W. 3498 (1988)	1
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)	4
Nichols v. Tyvasy, 809 F.2d 1317 (8th Cir. 1987)	2
Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 114, 119 (1968)	1
Tulsa Professional Collection Services v. Pope, 108 S. Ct. 1340, 1344, 1346 (1988)	4
United States v. Atlantic Richfield, 435 F. Supp. 1009, 1018 (D. Alaska 1977), *aff'd* 612 F.2d 1132 (9th Cir. 1980, *cert. denied* 449 U.S. 888)	2
STATUTES:	
ANCSA Section 26 (uncodified)	3
28 U.S.C. Section 2409a(d)	4
28 U.S.C. Section 2409a(g)	4
OTHER AUTHORITIES:	
Conference Report No. 92-746, Page 2253	2
House Report 92-523, 1972 U.S. Code Cong. & Ad. News, page 2199	2

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

Petitioners Therese U. Donnelly and James W. Lee reply briefly to the oppositions to their petitions for writs of *certiorari*. Petitioners emphasize respondents' misreading of the opinion below. It is reasonable to conclude that, if the government had read the opinion below as petitioners and *amici* read it, then the government would have responded differently to the petitions. The government's response demonstrates, at a minimum, that the opinion below may be susceptible to different readings which this Court should clarify by review. The lower courts which administer ANCSA will ultimately have to struggle with these different interpretations if this Court were to forego this opportunity of clarifying the meaning of ANCSA and other legal issues raised below.

1. Contrary to the government's statement (government Opposition at page ___), the previous proceedings in *Lee v. United States et al*, 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee v. Eklutna et al*, 56 U.S.L.W. 3498 (1988) did *not* address the effect of the Alaska Native Claims Settlement Act ("ANCSA") on the constructive trust remedial doctrine of this Court.

2. Contrary to the government representation (Opposition, page ___), Donnelly's petition *did* raise and address the purported "indispensable party" issue.

> Under no theory is the United States a party to a Section 14(g) claim. It claims no interest in the land; no federal interest is in dispute. *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114, 119 (1968).

> That the United States issued the patent does not make it a party. *Daniels v. Wagner*, 237 U.S. 547, 567 (1915).

Donnelly petition, pp. 9-10. See also *Lee* petition at pp. 20-21. The Court of Appeals itself said Donnelly's constructive trust claim was pre-empted by ANCSA, not that the United States was an indispensable party to her non-Quiet Title Act constructive trust claim against Eklutna. Amended Opinion, App. p. 16a.

The United States' presence as a party is not required under a trust theory. Congress made clear that ANCSA created no trust relationship. House Report 92-523, 1972 U.S. Code Cong. & Ad. News, page 2199; Conference Report No. 92-746, page 2253; *United States v. Atlantic Richfield*, 435 F.Supp. 1009, 1018 (D.Alaska 1977), aff'd 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980). Respondents' reliance on *Nichols v. Tyvasy*, 809 F.2d 1317 (8th Cir. 1987) is therefore misplaced.

3. Contrary to the government's assertion (Opposition, page ___), the Court of Appeals did *not* deny petitioners' Section 14(c)(1) claim on the merits. That court specifically denied their Section 14(c)(1) claim on the theory that the United States was an indispensable party which could not be joined. The Court of Appeals stated:

> Put another way, appellants' Section 14(c)(1) claims are, again, based on their title claim, which *cannot be resolved* in any action to which the United States is not a party. Accordingly, the Section 14(c)(1) claims are also barred by the QTA statute of limitations.

Amended Opinion, Donnelly Appendix 16a. Emphasis supplied. The opinion below, moreover, sets forth no facts which could support a decision on the merits.

Respondents appear to argue that the *Buettner v. Kavilco*, (9th Cir. No. 87-4435, Oct. 26, 1988) opinion shows that the United States is not an indispensable party to a Section 14(c)(1) claim. However, that is exactly what petitioners are contending. For this and other reasons demonstrated by petitioners, the decision below should be reversed.

Nowhere do respondents address the effect of ANCSA Section 26 (uncodified), discussed in Donnelly's petition at 21. ANCSA Section 26 cannot be reconciled with the Ninth Circuit Court of Appeals' explicit ruling that Section 14(c) claims depend on the pre-ANCSA status of the land, and respondents have not addressed this difficulty.

4. The government misconceives the significance of the *Donnelly* and *Hakala* decisions. *Hakala and Kitchen v. Atxam*, 753 P.2d 1144 (Alaska 1988). The government argues that *Donnelly* reaches only a narrow result, but the broad language employed in the opinion below will impact all land occupants in Alaska, whether the appeals court intended such result or not. *Donnelly* appears to direct a district court to dismiss any occupancy claim as to which the claimant cannot quiet his title against the United States. The state court interpretation, *Hakala*, conflicts with the *Donnelly* decision because the *Hakala* plaintiffs demonstrated no pre-existing right of occupancy, as *Donnelly* commands. The Ninth Circuit Court of Appeals acknolwedge, App. A, p. 16a, n.9, that the decision below conflicts with *Hakala*, and respondents have not addressed this fact.

5. Respondents argue that 28 U.S.C. Section 2409a(g) was triggered by the United States telling Donnelly that the United States claimed some land in the Eagle River Valley to be reserved. Until the government particularized its claim and stated what land inside Donnelly's claim was reserved, however, Donnelly could not draw a complaint that meets the requisites of a Quite Title Act complaint: "The complaint shall set forth *with particularity* . . . the right, title, of interest claimed by the United States." 28 U.S.C. Section 2409a(d). Until Donnelly knew that the boundary of the alleged reserve actually conflicted with his homestead tract, he could not meet this requirement. The QTA limitations period did not begin, therefore, until the United States in 1964 issued its final decision and declared to him the alleged boundary location. The appeals court itself was of the view that an actionable claim did not arise until completion of the administrative process. Amended Opinion, App. A, p. 12a. The error below was that court's disregard of the contents of the administrative record showing a continuous administrative proceeding which ended in 1964, not in 1961. Appendices F, G and H.

As to the sufficiency of notice in the Federal Register, it is fundamental due process jurisprudence that notice by publication is not sufficient where personal notice can be given. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340, 1344, 1346 (1988).

In conclusion, petitioners submit that this Court should not be diverted by respondents' misreading of the decision below. They respectfully request the

Court to issue a writ of *certiorari* to address the issues raised by the decision below.

Dated at Anchorage, Alaska this 13th day of January, 1989.

STEVEN P. OLIVER
720 M Street, Suite 201
Anchorage, Alaska 99501
(907) 276-6106

Attorney for Therese U. Donnelly
and James W. Lee